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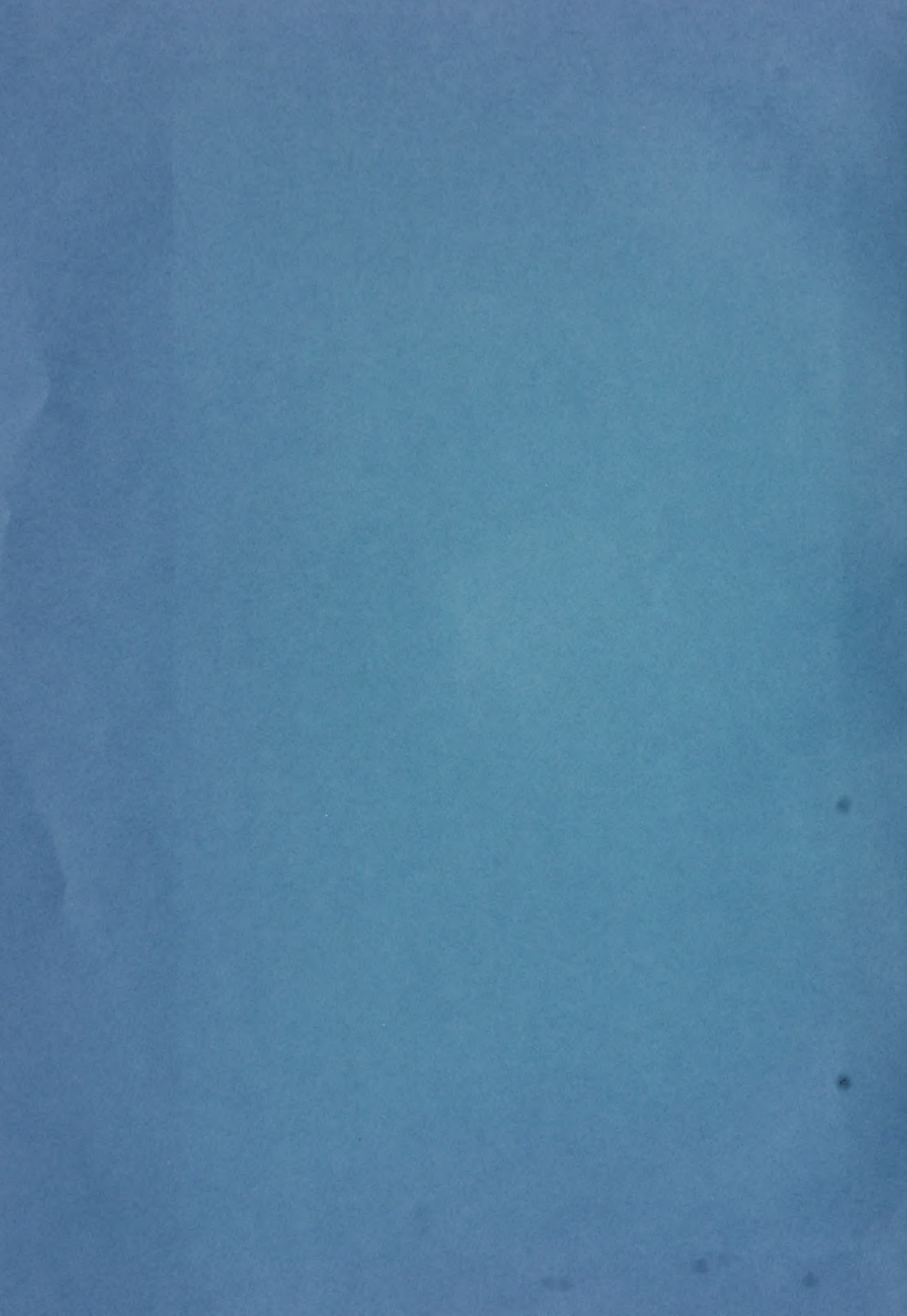
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No. 22,560

IN THE

United States Court of Appeals

For the Ninth Circuit

PSG Co., a corporation,
and PHILIP S. GREENBERG,

Appellants,

VS.

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.,

Appellee.

**Appeal from the United States District Court
for the District of Oregon**

Honorable Robert C. Belloni, Judge

APPELLANTS' OPENING BRIEF

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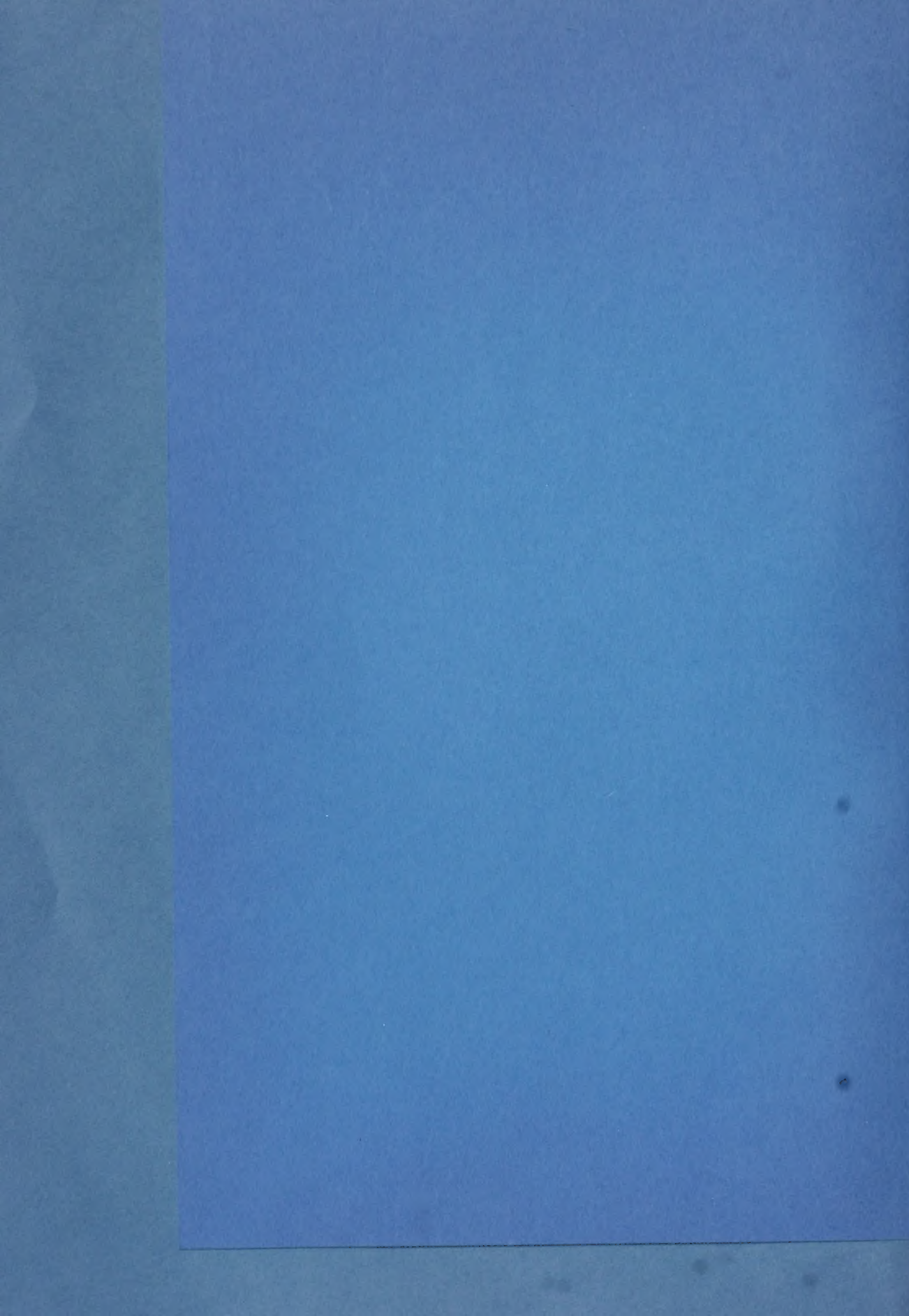
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No. 22,560

IN THE

**United States Court of Appeals
For the Ninth Circuit**

| | |
|---|--|
| PSG Co., a corporation, and PHILIP S. GREENBERG, vs. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., | <i>Appellants,</i> <i>Appellee.</i> |
|---|--|

**Appeal from the United States District Court
for the District of Oregon**

Honorable Robert C. Belloni, Judge

APPELLANTS' OPENING BRIEF

I

INTRODUCTION

This case involves trading in sugar futures commodity contracts. It arose out of alleged breaches of duties owed by a commodities brokerage house to its customer.

Jurisdiction of the trial court is found in 28 U.S.C. 1332 upon the allegations of the Complaint (Cl. Tr. p. 1) that plaintiffs are an Oregon corporation and

Oregon citizen suing a Delaware corporation, with the amount in controversy exceeding the sum of \$10,000.00, exclusive of interest and costs.

Plaintiff's appeal from adverse rulings of the trial court; the jurisdiction of this court is therefore found in 28 U.S.C. 1291.

II

STATEMENT OF THE CASE

The Complaint alleges that plaintiff Philip Greenberg and his corporation, PSG Co. [both hereinafter referred to, for convenience, as "plaintiff"] entered into agreements with defendant brokerage house whereby defendant agreed to accept plaintiff's business of buying and selling commodity futures contracts up to a maximum of 300 contracts open at any one time; if defendant desired to modify the said agreement it would give plaintiff reasonable notice before undertaking to do so. (Cl. Tr. p. 2.)

The Complaint further alleges that on October 22, 1965, at a time when plaintiff held with defendant some 587 sugar contracts, representing a total value of \$1,859,887.40, with 207 contracts open, with plaintiff in full compliance with defendant's margin and other requirements, defendant suddenly, without advance notice, at 6:15 A.M. in the morning, immediately prior to the opening of trading on the commodity exchanges that day, notified plaintiff that, starting immediately, it would accept liquidating orders only

from plaintiff, with a limit of only 100 contracts open. (Cl. Tr. p. 3.)

The Complaint further alleges that defendant well knew that it was plaintiff's exclusive broker and that plaintiff had to continue to trade in the sugar futures market or suffer economically, that plaintiff could not trade through any other broker for some several days thereafter until plaintiff could establish new arrangements with another broker. (Cl. Tr. p. 4.) It is alleged that defendant knew, prior to the said day of October 22, 1965 that the said action of reducing plaintiff's limits was to be taken by defendant but instructed its employees not to inform plaintiffs of such pending action. (Cl. Tr. p. 4.)

The Complaint alleges that such conduct of defendant was unreasonable, arbitrary and in bad faith and in breach of the foregoing agreements between the parties and of the fiduciary duties owed by defendant to plaintiffs. (Cl. Tr. p. 4.) The Complaint alleges that plaintiffs thereafter attempted to place trading orders with defendant but that the same were refused, but that defendant continued to act as broker for plaintiffs by accepting liquidating orders. (Cl. Tr. p. 5.) The Complaint alleges that as a proximate result of the said conduct of defendant plaintiff suffered a loss from the refusal of defendant to accept the above described orders of plaintiffs in the amount of \$45,221.68. (Cl. Tr. p. 5.)

The Complaint further alleges that defendant's conduct was done willfully, wantonly and maliciously and with a deliberate intent to injure plaintiff and prays

for exemplary damages in the amount of \$500,000.00. (Cl. Tr. p. 5.)

The Complaint alleged a second cause of action, commonly known as the "Brazil" matter and a third cause of action concerning payment of certain telephone charges (Cl. Tr. pp. 5, 6); these latter matters, together with a counterclaim filed by defendant (Cl. Tr. p. 41) were settled at the time of trial (Cl. Tr. p. 88) and are not involved in the instant appeal.

Plaintiffs demanded a jury trial. (Cl. Tr. p. 6.)

Defendant's answer (Cl. Tr. pp. 38, et seq.) denies the allegation of an agreement for defendant to carry a total of 300 open contracts with plaintiff; admits that plaintiff did substantial business with defendant, that plaintiff had 207 open contracts with defendant immediately prior to October 22, 1965 and that on October 22, 1965 at approximately 6:15 A.M. it informed plaintiff that, starting immediately, the only orders which it would accept from plaintiff would be liquidating orders. (Cl. Tr. pp. 39, 40.) The answer further admits that subsequent to October 22, 1965 it continued to act as broker for plaintiff by accepting liquidating orders from plaintiff. (Cl. Tr. p. 40.)

Extraordinarily extensive and bitterly contested discovery proceedings were thereafter had. (Cl. Tr. pp. 96-99.)

Before pretrial plaintiff sought to include in the issues the charge that defendant in handling plaintiff's accounts was guilty of a violation of the Rob-

inson-Patman Act (15 U.S.C. 13(c)) or, in the alternative, a claim for return of fraudently obtained commissions based upon defendant's secretly acting for itself contrary to the interest of plaintiff with respect to commodity futures orders. (Cl. Tr. p. 450.) This motion was denied. (Cl. Tr. p. 72.)

At the trial, before a jury, the court during the first day of trial granted defendant's motion to remove the issue of punitive damages from the case. (Cl. Tr. p. 100.)

Thereafter the trial court, at the conclusion of plaintiff's case, granted defendant's motion to dismiss plaintiff's Complaint (Cl. Tr. p. 100), and entered judgment thereon. (Cl. Tr. p. 87.)

III

SPECIFICATION OF ERRORS

Appellant respectfully contends that the trial court committed the following three principal errors:

1. It erroneously took the case from the jury by granting defendant's motion to dismiss at the end of plaintiff's case. (Rep. Tr. p. 270.)
2. It erroneously took from the jury the issue of punitive damages during the first day of trial. (Rep. Tr. pp. 79, 113.)
3. It erred, at pre-trial, in refusing to permit the issue of defendant's alleged violation of the Robinson-Patman Act in handling the account to be brought before the jury in this case. (Cl. Tr. p. 72.)

IV

ARGUMENT

A. DISMISSAL OF PLAINTIFF'S COMPLAINT

As recited above at the conclusion of plaintiff's case defendant moved to dismiss the first cause of action (Rep. Tr. p. 248.) The court granted the motion to dismiss. (Rep. Tr. p. 270.)

It is respectfully submitted that such action of the court in granting the motion to dismiss constitutes reversible error, both procedurally and in substance.

1. Procedural Error in Granting Motion to Dismiss.

Appellant contends that a motion to dismiss does not lie in a jury case. Rule 41(b) F.R.C.P. provides that in a *non-jury* case the court may grant a motion to dismiss at the conclusion of plaintiff's case. As is pointed out in the Notes of the Advisory Committee on Rules (28 U.S.C.A. 1967 pocket part, p. 91), a motion to dismiss has not been available in a jury case since the 1963 amendment to said rule.

Secondly, even were a motion to dismiss available in the instant jury case, the court in granting the same would be required by the said rule to make specific findings, so that its factual determinations might clearly appear on the record. (See *Young v. U.S.* (9th Circuit), 111 Fed. 2d 823; *Matcas v. Fred Harvey*, (9th Circuit) 146 Fed. 2d 989.) No findings of any sort were made in this case, so there is no support for the judgment (Cl. Tr. p. 87), as is required by Rule 41(b).

It should be noted that the form of the judgment refers to a motion for directed verdict in its prefatory language (Cl. Tr. p. 87, l. 20) but the adjudication grants a dismissal of the action; it does not grant a directed verdict. In any event, the record is clear that no motion for directed verdict was ever made. (Rep. Tr. pp. 248-270.) This court has held that the trial court in a jury case cannot order judgment where no motion for directed verdict has been made (*Guerrero v. American-Hawaiian Steamship Co.*, 222 Fed. 2d 238, 244.)

The two motions, of course, are not the same, at least since the 1963 amendment to F.R.C.P. 41(b). The granting of a motion to dismiss, such as was done here, determines disputed fact issues, and therefore requires findings, whereas the granting of a directed verdict determines points of law. For a pre-1963 discussion of the distinction between the two motions see comments of Judge Healy in dissenting opinion in *Mateas v. Fred Harvey*, 146 Fed. 2d 989, 993.

2. Granting of Motion Was Wrong in Substance.

a. Fact Issue of Notice.

As noted above, no findings were made by the trial court, so that we cannot know the exact basis upon which the court ordered judgment. The reporter's transcript contains comments by the court from which it might be inferred that the court was making the following factual determinations:

(1) that the evidence showed a binding promise by defendant to handle all of plaintiff's business up to 300 contracts open;

(2) that plaintiff built up his business in reliance upon this binding promise but

(3) such promise was terminable at will (Rep. Tr. p. 269).

It hardly needs citation of authority that the trial court cannot make such factual determinations in a jury case unless there is no evidence upon which the jury could base a contrary finding (*Marks v. Barbara* (9th Circuit) 274 Fed. 2d 934). The record reveals a great deal of evidence to the contrary, most of which was cited to the court at the time of arguing the motion to dismiss (Rep. Tr. pp. 251-259). The parties are agreed there is nothing in writing on the issue. At the time of the ruling the following evidence was before the jury from which the jury might well have concluded that defendant was required to give reasonable notice before reducing plaintiff's limits from 300 to 100.

(1) Plaintiff, who was experienced in the business, (Rep. Tr. p. 81) testified that it was the custom of the trade to give notice under the circumstances involved here. (Rep. Tr. p. 95, 191.) No notice was given him. (Rep. Tr. p. 41.)

(2) Plaintiff testified without objection that it was understood between the parties that proper notice would be given. (Rep. Tr. p. 92.)

(3) Plaintiff's expert in the trade (Rep. Tr. p. 129-131), Mr. Engelmohr, testified that it is the custom in the business for the brokerage house to give rea-

sonable advance notice under the circumstances here involved. (Rep. Tr. p. 131-132.)

(4) Mr. Engelmohr further testified, as an expert in the field, that he “could not conceive” of a brokerage house committing such an act as defendant committed in this case [that is arbitrarily lowering trading limits without advance notice]. (Rep. Tr. p. 136.)

(5) Mr. Engelmohr further testified that he had never in all of his experience encountered such an act as defendant committed in this case. (Rep. Tr. p. 152.)

(6) Defendant itself, in the deposition of one of its principal officers, admitted that, had it known that plaintiff had not been told ahead of time about his reduction in limits, defendant could not have done what it did. (Rep. Tr. p. 214.) As noted above, plaintiff testified no notice was given. (Rep. Tr. p. 41.)

(7) The law itself requires the giving of reasonable notice concerning a change in the relationship between broker and client where the agreement does not specify the notice to be given. (Rep. Tr. p. 93.) See for example, *Rembert v. Fenner and Beane*, 173 Southern 551, 555 where this very defendant, in another law suit, argued that the law relating to brokers required reasonable notice:

“Counsel [for Fenner and Beane] also point to the fact that it is generally recognized both here and elsewhere, that the relationship of principal and agent is terminable at the will of either

party, *subject, of course, to reasonable notice.*"
(Emphasis added.)

To the same effect, that is, that the law requires reasonable notice under the circumstances here presented, see also *Smith v. Craig*, 221 N.Y. 456; 105 N.E. 798; *Rosenthal v. Brown*, 160 N.E. 921; *Small v. Housman*, 208 N.Y. 115, 101 N.E. 700; Meyers, *The Law of Stock Brokers and Stock Exchanges*, sec. 79.

The question of what is reasonable notice is a fact question to be determined by the *jury*. See *Small v. Housman*, 208 N.Y. 115, 101 N.E. 700; *Landow v. Grey*, 232 N.Y.S.2d 247, 253, and cases there cited; *Thompson v. Baily*, 116 N.E. 387; *Rosenthal v. Brown*, 160 N.E. 921.

(8) The jury could certainly *infer* that defendant was required to give reasonable advance notice before changing plaintiff's limits from the following facts which had been introduced as part of plaintiff's case:

Defendant knew it was plaintiff's only broker (Rep. Tr. pp. 23-24); plaintiff built his large position to 267 contracts open in October (Rep. Tr. p. 98) upon the understanding that he could trade with defendant up to 300 contracts open (Rep. Tr. p. 41); defendant itself admitted that if a trader has a large open position and cannot trade he is exposed to a risk of financial loss (Rep. Tr. pp. 212-213, 61-62); see argument of counsel for defendant as to the volatility and rapid fluctuations of this market (Pretrial Rep. Tr. p. 4); as a result of defendant's action plaintiff was unable to trade from October 22 to November 3

before he could obtain another broker (Rep. Tr. pp. 56-65); this was a reasonable length of time under the circumstances (Rep. Tr. pp. 135, 136, 153).

(9) The parties *agreed* in the pretrial order as follows:

“Sometime in March, 1965 the parties modified the above agreements and defendant agreed that it would accept orders from plaintiffs to buy and sell sugar futures contracts up to a maximum of 300 contracts open at any one time . . .” (Cl. Tr. p. 60.)

As noted above, plaintiff testified that it never received any notice prior to the act complained of that defendant was attempting to void this agreement. (Rep. Tr. p. 41.)

(10) The court itself at one point stated:

“ . . . if the jury should accept Mr. Greenberg’s testimony—and this is not a ruling—as being true, the most they could find is that there was a contract to leave those limits open.” (Rep. Tr. p. 113.)

Surely the jury could infer the necessity of a reasonable notice prior to an attempted change of that contract?

(11) Defendant’s contention that no notice was necessary before it changed plaintiff’s limits from 300 to 100 is itself one of the strongest indications of the necessary inference of reasonable notice. If defendant were correct, then the lowered limit of 100 could itself be changed without notice, thus rendering mean-

ingless the new “agreement” to take plaintiff’s business up to 100 contracts open!

As noted above no findings were made by the court, so we cannot know the exact basis for its dismissal of plaintiff’s complaint. In the event that the court’s language at Rep. Tr. p. 269 that defendant’s “binding promise” to handle all of plaintiff’s business up to 300 contracts open was terminable at will without notice be taken as the court’s basis for ordering judgment it is submitted that the evidence detailed above would have permitted the jury to find that reasonable notice was required, and that the court therefore erred in removing the case from the jury on this factual basis.

b. Fact Issue of Damages.

The trial court made some comment concerning the “speculative” nature of plaintiff’s damages resulting from the placing of “hypothetical” orders. (Rep. Tr. p. 270.) However the court later, in explaining its order dismissing the complaint, stated that it found no liability and therefore “couldn’t even get to the point of damages”. (Rep. Tr. p. 271.) Since there are no findings we cannot know whether the court intended to decide the controverted issue of damages. In the event that it be argued that the court did, by the above language, without findings, determine such factual issue of no damages we submit the following upon which the jury could have found plaintiff’s substantial damages:

(1) The court commented on “hypothetical” orders to show damages. (Rep. Tr. p. 270.) But the

uncontradicted testimony was that plaintiff actually transmitted to defendant seven specific orders. (Rep. Tr. pp. 51-54; Exhibit 75.) The court inferred that these were “hypothetical” orders because plaintiff “knew they would not be accepted”. (Rep. Tr. p. 270.) The *uncontradicted* evidence, however, was that plaintiff did *not* know his orders would not be accepted. (Rep. Tr. pp. 52-54, 60-61, 197, 200.) Some of these orders actually were accepted by defendant. (Rep. Tr. pp. 52-54.)

(2) Plaintiff’s specific monetary loss, of course, was clearly before the jury. Plaintiff showed that if defendant had taken his orders for specific contracts, as it was required to do, the actual cash value of those contracts would have been some forty-five thousand dollars more than cost (Exhibit 75) by the time plaintiff was able to end the damages flowing from defendant’s conduct by securing another broker. (Rep. Tr. pp. 56-65.) Far from being “hypothetical”, this sum was actual cash money plaintiff was entitled to withdraw from his account. (Rep. Tr. pp. 11-15.) *In re Rosenbaum*, 112 F.2d 315. See *Merrill Lynch v. Miller*, 401 S.W. 2d 645 re measure of damages as measured by the difference between cost of contracts wrongfully refused and their subsequent value. See also *Saddler v. Orton*, 161 Atl. 490; *Mekrut v. Gould*, 188 N.Y.S. 2d 6; *Opper v. Hancock*, 250 F.S. 668, affirmed in 367 F.2d 157; *James Wood v. Coe*, 191 F.S. 330. Baer and Saxon, *Commodity Exchanges and Futures Trading*, p. 309. It is not necessary for the customer whose order has been wrongfully refused to actually

place that order again before he can show damages; this was conceded by the trial court itself. (See Rep. Tr. p. 63 of pretrial conference; Meyer, *The Law of Stock Brokers and Stock Exchanges*, p. 546, sec. 134.) It is significant that defendant itself treated the question of damages as a *fact issue* in that it was about to introduce expert witnesses to testify as to the dollar amount of plaintiff's injury (Rep. Tr. pp. 264, 265)—minimal according to defendant, of course!

It is respectfully submitted that, if the trial court intended to find that plaintiff had suffered no damages the jury could have found to the contrary, under proper instructions on the above evidence, and that the court therefore erred in dismissing plaintiff's complaint on this ground—if, indeed, this was one of the court's grounds.

B. STRIKING PUNITIVE DAMAGES

Plaintiff's complaint alleged and prayed punitive damages. (Cl. Tr. p. 5.) During the course of the first day's trial, while plaintiff's first witness (himself) was still on direct examination the trial court ordered counsel for plaintiff to "skip" the subject of punitive damages for the time being (Rep. Tr. p. 79); at the end of the first day of trial it ruled as follows:

"It is my ruling that the question of punitive damages will not be submitted to this jury and that all exhibits which purposes are to prove punitive damages are rejected." (Rep. Tr. p. 113.)

Appellant respectfully contends that this ruling constitutes the second principal error herein.

At the outset it should be noted that the above ruling came early during the presentation of plaintiff's case and effectively barred plaintiff from introducing any evidence whatever, oral or documentary, on the subject. In effect, the ruling granted defendant's pretrial motion on the subject (Cl. Tr. p. 429), the court having, at pretrial, reserved ruling thereon (Cl. Tr. p. 99). Since the court made no findings in the case, the record does not reflect the exact basis for the order, that is, whether it was deciding a fact issue or a point of law. Since plaintiff was precluded from introducing any evidence on the subject, it may be presumed that the court was ruling that punitive damages could not be recovered here, regardless of the fact circumstances.

An examination of the language used by the court at the time suggests that it may have been ruling on a point of law, as follows: punitive damages may be recovered in a contract case where a fiduciary relationship exists, but there could be no fiduciary relationship in this case because defendant would not take plaintiff's orders. (Rep. Tr. pp. 109, 113.) The essence of the court's thinking would seem to appear at Rep. Tr. p. 113, ls. 12-13:

“I don't feel that any fiduciary relationship came into existence with respect to future orders.”

Appellant is now in the rather anomalous position of attempting to show that there was a fiduciary rela-

tionship between the parties despite the fact that the trial court barred the introduction of any evidence on the subject. Nevertheless, we submit that the record, as it stands, forgetting about what additional evidence plaintiff might have introduced on the subject, shows at least the following:

1. Defendant *did* accept orders from plaintiff after October 22. (Rep. Tr. pp. 52-54; Cl. Tr. p. 58.)

2. Defendant's own answer admits that it continued to act as broker for plaintiff after October 22. (Cl. Tr. p. 40, ls. 13-14.)

3. The parties agreed in the pretrial order that defendant continued to act as plaintiff's broker with respect to certain orders until February 10, 1966. (Cl. Tr. p. 58, l. 23.)

4. Unlike the duties of a stock broker, the commodity broker's duties do *not* terminate upon execution of the order to buy or sell, but continue for a long time thereafter in carrying out those contracts in its own name with the exchange. (Rep. Tr. p. 14, Exhibit 59.) Frequently the broker is called upon to take physical delivery of the commodity for its client many months after the purchase of the contract. See *Volkart v. Freeman*, 331 F.2d 52 for an excellent discussion of the subject. For example, plaintiff late in 1964 through defendant as his broker, bought May, 1965 sugar futures contracts, upon which defendant became obligated to take delivery for plaintiff of some 14,200 long tons of raw sugar; defendant paid out for plaintiff over \$100,000.00 for some 2,000 tons thereof

and was still involved in the transaction in August, 1965 (Cl. Tr. pp. 54-56), which was some eight or nine months after execution of the purchase order. At the time of the act complained of defendant had accepted and was carrying some 584 contracts for plaintiff (Exhibit 185), each of which defendant was obligated to execute for plaintiff *after* October 22.

It is clear that defendant, both at the time complained of, and for a long time thereafter, acted as plaintiff's broker. Regardless of whether certain particular orders were or were not taken by defendant after October 22, defendant was plaintiff's broker at the time of the act complained of, i.e., at the time of purported rescission of the Agreement to take plaintiff's business up to 300 contracts open. The fact that plaintiff *thereafter* tried, with varying success, to place certain orders did not terminate the status of defendant as plaintiff's broker; such fact goes only to prove extent of damages.

Defendant's argument that it is not liable as a broker because it refused to accept certain orders after the act complained of is akin to a doctor denying liability for malpractice on the ground that he refused to treat the patient after the malpractice!

Defendant concedes that an agent who breaches a fiduciary relationship is liable for punitive damages (Pretrial Rep. Tr. p. 72, ls. 21-24) and that a broker becomes an agent when it accepts its principal's order (Pretrial Rep. Tr. p. 80). See *Harper v. Interstate Brewery*, 168 Or. 26, 120 P. 2d 757; *Brown v. Coates*, 253 F. 2d 36.

It might be noted that, at the above-cited portion of the pretrial hearing the court, in considering this very question of punitive damages, stated:

“Of course I have to wait to see what the testimony shows before I can even decide what the relationship of the parties was.” (Pretrial Rep. Tr. p. 81.)

Yet in the very early stages of the trial the court ruled that plaintiff could not introduce evidence on the subject, as noted above.

Defendant states the rule on punitive damages in Oregon as follows:

“Although it is true that in Oregon exemplary damages may be awarded where there is evidence that the wrongful act was done intentionally, without just cause or excuse and with knowledge of harm to a particular person or persons, *McElwain v. Georgia Pacific* (Dec. 28, 1966) 83 Or. Adv. Sheets 707, 708, 421 P. 2d 957 we call to the Court’s attention that the rule decided in the *Georgia-Pacific* case involved a tort and not a breach of contract.” (Cl. Tr. p. 478.)

(Since defendant concedes that a fiduciary may be liable for punitive damages (*supra*) the attempted distinction between tort and contract is, of course, immaterial here.)

In view of the fact that the court would not permit plaintiff to introduce evidence on the subject of punitive damages, the question of the sufficiency of the evidence to go to the jury would seem to be not before this court at the present time. Nevertheless,

appellant can point to the following facts in the record as it stands which would suggest that the jury might indeed find punitive damages here:

1. The relationship between the parties was a close one. (Rep. Tr. p. 88.)
2. Plaintiff became a member of the New York Exchange at defendant's suggestion. (Rep. Tr. p. 82.)
3. Defendant actively solicited plaintiff's orders. (Rep. Tr. pp. 15-16.)
4. Defendant was plaintiff's only broker, as defendant well knew. (Rep. Tr. pp. 23, 24.)
5. Defendant told plaintiff it would take plaintiff's business up to 300 contracts open and never told him otherwise prior to the act complained of. (Rep. Tr. p. 41.)
6. The matter of limits was vital to plaintiff because in dealing with actual physical sugar purchases and sales he had to know that his actuals could be protected by his futures contracts. (Rep. Tr. p. 24.)
7. In reliance on the limits of 300 plaintiff in October built his position to 267 contracts long (i.e., to *buy*), which contracts defendant accepted despite their claim that plaintiff's limits were 100 open after June, 1965. (Cl. Tr. p. 488.)
8. This large *long* position of plaintiff was built in connection with an actual transaction plaintiff was putting together at the time (Rep. Tr. p. 98); defendant knew of plaintiff's "actuals" (Rep. Tr. p. 189).

9. Prior to October 22 defendant's New York headquarters instructed its Portland office to see to it that plaintiff knew of the reduced limits (Exhibits 14, 15) and yet no word was given to plaintiff (Rep. Tr. p. 41), though plaintiff was in frequent touch with defendant immediately prior to the 22nd (Rep. Tr. pp. 57-58).

10. Defendant knew its action would cause plaintiff great harm, but defendant didn't care. (Rep. Tr. pp. 61, 62, 212, 213.)

11. Defendant admitted it could not have taken the action it did had it known that plaintiff did not know of the reduced limits. (Rep. Tr. p. 214.)

12. An act such as that done by defendant that is, changing limits without notice, is unheard of in the business. (Rep. Tr. pp. 136, 152.)

13. Immediately prior to October 22, on October 21, defendant told plaintiff that it (defendant) was going to sell the market (Rep. Tr. p. 190); since plaintiff was at the time extremely vulnerable in a *long* (buy) position at the time, as defendant well knew, plaintiff had to sell the market also to protect himself (Rep. Tr. pp. 100, 190), yet defendant arbitrarily prevented plaintiff from placing such orders (Rep. Tr. pp. 51-54) because he couldn't do business elsewhere for at least a week (Rep. Tr. pp. 135-136).

14. Plaintiff not only showed that defendant was guilty of a reckless disregard of plaintiff's interests but plaintiff attempted to go further to show the real reason for defendant's seemingly senseless action of

cutting down a good customer (Rep. Tr. p. 194) who was not in default in any way (Rep. Tr. p. 42), thus depriving themselves of substantial commissions. (For example, at the time of the act complained of, defendant was carrying some 587 contracts (Exhibits 34, 35) on which defendant had received commission of \$7.50 each (Rep. Tr. pp. 45, 46) or \$4,400.00.) The real motive of defendant in doing what it did appears in Exhibits 140, 141, 142, 162, 163, 164 and 190, which exhibits were refused by the court. (Rep. Tr. p. 119.) Particular attention is invited to Exhibit 190 a, c, e; even without accompanying explanation, it shows that defendant in October was *itself* in an extraordinarily exposed position in the market as compared with its normal activities, and that it was thus for its own personal gain, regardless of the consequences to its clients, that it took the action it did.

It is respectfully submitted that there is ample evidence upon which the jury could have found punitive damages here.

C. ROBINSON-PATMAN VIOLATION

Appellant contends that the trial court erred in refusing to permit the issue of defendant's alleged violations of the Robinson-Patman Act (15 U.S.C. 13c) to be submitted to the jury (Pretrial Rep. Tr. p. 48), or, in the alternative, to permit the jury to consider the issue of a common law breach of fiduciary duties entitling plaintiff to a return of commissions paid (Cl. Tr. p. 72).

The facts concerning these issues were not in the original complaint, though the same did allege that defendant breached fiduciary duties owed plaintiff. (Cl. Tr. p. 4.)

More than a month before pretrial (Cl. Tr. p. 434) plaintiff asked leave to introduce the above issues, and if needs be, to amend the Complaint (Cl. Tr. p. 450).

At the pretrial hearing plaintiff contended that the facts supporting these issues had only recently been established from defendant's records; that defendant had resisted discovery proceedings (Pretrial Rep. Tr. p. 24 et seq.) so extraordinarily that plaintiff could not have raised the issue sooner.

The docket (Cl. Tr. p. 544 et seq.) shows the following entries pertinent to appellant's contention:

Jan. 3, 1966—Return of summons served on defendant.

Jan. 10, 1966—Stipulation extending defendant's time to plead.

Feb. 14, 1966—Defendant's challenge to the sufficiency of the Complaint.

March 1, 1966—Order reserving ruling on complaint and Order defendant to answer by March 14, 1966.

March 11, 1966—Answer and Counterclaim filed.

March 24, 1966—Answer to Counterclaim filed.

April 15, 1966—Plaintiff's motion for production of documents filed.

April 21, 1966—Defendant's memo in opposition filed.

April 25, 1966—Plaintiff's motion for production granted.

June 24, 1966—Plaintiff's motion to require defendant to comply with above order filed.

June 30, 1966—Defendant's motion to postpone hearing of above motion.

July 21-25, 1966—Defendant's supporting documents in opposition to discovery filed.

July 25, 1966—Order granting discovery motion, in part.

Oct. 28, 1966—Plaintiff's interrogatories filed.

Nov. 7, 1966—Defendant's objections to interrogatories and motion to strike filed.

Dec. 5, 7, 1966—Orders granting plaintiff's motion, in part.

Jan. 18, 1967—Plaintiff's motion to require defendant to comply with above orders filed.

Jan. 20, 1967 to July 13, 1967—Proceedings relating to defendant's interrogatories and motion to produce.

Aug. 4, 1967—Plaintiff's second interrogatories filed.

Aug. 10, 1967—Defendant's objections to above filed.

At pretrial, August 21, 1967 plaintiff showed that as a result of defendant's resistance to discovery, as recited above, the evidence showing "bucketing", that is, that defendant in its London operations was actually taking the other side of plaintiff's contracts, was not produced by defendant until July, 1967. (Pretrial Rep. Tr. pp. 29-37.) This data had been sought by plaintiff from defendant since April 15, 1966 (Cl. Tr. p. 105); the court had repeatedly granted plain-

tiff's motions to enforce discovery, which Orders defendant had frustrated, as cited to the docket above.

Among the facts appearing in the pretrial order is the following: defendant corporation has a wholly owned subsidiary corporation in Panama, which, in turn, has a wholly owned subsidiary corporation in Switzerland, which, in turn, has a wholly owned subsidiary corporation in Britain. (Cl. Tr. p. 59.) Appellant offered to prove that through this chain of subsidiaries defendant was acting as a concealed principal in taking the other side of plaintiff's orders. (Pretrial Rep. Tr. p. 36.) Counsel for defendant stoutly protested that defendant would not do such an act because it was a serious criminal offense; counsel did not deny that his client's subsidiary, four times removed, had not done so, contending that the London operations had nothing to do with his client. (Pretrial Rep. Tr. pp. 43-44.)

The court indicated it was "impressed" with the reason for plaintiff's late motion to amend arising out of defendant's obstructions to discovery (Pretrial Rep. Tr. p. 28), and that plaintiff's motion was "not unreasonable" (Pretrial Rep. Tr. p. 48).

The court however denied the motion upon the ground that the trial would have to be continued if the issue were allowed into the case and that such continuance would upset the court's calendar, a particularly disturbing thing in view of the shortage of judges; secondly, the new issue would unduly complicate things for the jury. (Pretrial Rep. Tr. p. 48.)

Appellant respectfully contends that this ruling constitutes error.

In the recent case of *Brier v. Northern Calif. Bowling* (9th Circuit) 316 F. 2d 787 this court quoted the mandate of Supreme Court on the subject in *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 as follows:

“If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be freely given.”

See also *Rosenberg v. Arnold* (9th Circuit) 283 F. 2d 406:

“In view of the extreme liberality generally in favoring amendments to pleadings under the Federal Rules of Civil Procedure and the general policy thereunder of wrapping in one bundle all matters concerning the same subject matter, we hold it was error not to let appellant’s amended counterclaim stay in the pleadings.”

In *Northwest v. Gorter* (9th Circuit) 254 F. 2d 652 this court cited with approval *Robbins v. Jordan* (D. C. Circuit) 181 F. 2d 793, 794:

“As was said in *International Ladies’ Garment Workers’ Union v. Donnelly Garment Co.*, 8 Cir.,

1941, 121 F. 2d 561, 563: 'The Supreme Court of the United States has fixed the limits of permissible amendment with increasing liberality and has ruled that a change of the legal theory of the action is no longer accepted as a test of the propriety of a proposed amendment * * * Rule 15 of the Rules of Civil Procedure * * * expresses the same liberality with respect to the amendment of pleadings.'

"There can be no question that a defendant should be protected from surprise resulting from a change of theory; but it is our opinion that the court erred in the method it chose to protect him. The proper procedure would have been to grant the defendant a continuance in order to meet the new evidence. But it was beyond the limits of its judicial discretion to refuse to allow the amendment."

In *Kirk v. U.S.* (9th Circuit) 232 F. 2d 763 this court said, at 770:

"The injunction of Rule 15 (a) with respect to applications for leave to amend pleadings is: 'and leave shall be freely given when justice so required.' In *Rossiter v. Vogel*, (2nd Circuit) 134 F. 2d 908, 912, it was held error for the court to proceed to enter a summary judgment after showing had been made which would justify an amendment of the pleadings. Here the strongest possible showing for amendment was supplied by the defendant's own answers to interrogatories. The refusal to permit such an amendment in itself constitutional reversible error."

In the instant case surely no bad faith or dilatory tactics could be charged to plaintiff, though defendant

was obviously guilty of many such measures, as is indicated by the above-cited repeated necessity of plaintiff to obtain second and third orders from the court to compel defendant to make discovery previously ordered.

No continuances of trial had previously been sought by plaintiff but defendant had been granted a trial continuance for the convenience of its employees who were on vacation. (Pretrial Rep. Tr. p. 25.)

It is difficult to see prejudice to defendant in the requested amendment, since *all* of the evidence pertinent thereto was and had always been, in its own records. (See *Montgomery v. Cagle*, 265 F.S. 469.) We here, of course, speak of the evidence that defendant, through its chain of wholly owned subsidiaries, was actually taking the other side of plaintiff's contracts. The resistance of defendant to discovery is indeed understandable.

See articles written by Justice Douglas while a professor at Yale University, on the subject of "bucketing," i.e., a broker taking the other side of its customers' orders. 41 Yale Law Journal 949, 43 Yale Law Journal 46.

See also cases collected at 149 A.L.R. 665 concerning disregard of the corporate entity in violations of the Robinson-Patman Act, that is, that defendant corporation cannot wash its hands of the acts of its wholly-owned subsidiaries.

The basis of the court's denial of plaintiff's motion, as noted above, was the fact that a postponement of

the trial would become necessary, this would disturb the court's calendar unduly in view of the shortage of judges; and that the new issue would unduly complicate things for the jury. (Pretrial Rep. Tr. p. 48.)

It should be noted that neither side was pressing for trial. (Pretrial Rep. Tr. p. 45.) It would seem that the problem of the court's calendar due to a shortage of judges would be aided by a continuance rather than the other way around.

As to whether the new issue would unduly complicate things for the jury, it must be pointed out that the court thereafter took the whole case away from the jury! The new issue was a simple one: do defendant's records show that it bought the other side of plaintiff's contracts? Rather than complicating the case, it would appear to simplify matters, since it would tend to show defendant's personal motive in taking the arbitrary action it did.

The matter of defendant's motive was, of course, already in the case: as noted above, the original Complaint alleged defendant's breach of fiduciary duties (Cl. Tr. p. 4), so that at least the alternate issue proposed (breach of common law fiduciary duty of agent entitling principal to return of commissions paid) constituted no radical innovation in the case.

Defendant, it would appear, was thoroughly familiar with the matter since it had been resisting discovery thereon for more than a year, as noted above.

If plaintiff had not sought to amend the complaint in this regard defendant might argue that the issue

would be barred by res adjudicata, since the original complaint alleged defendant's breach of fiduciary duties. See *Buckman v. G.M. Corp.*, 159 F. 2d 728.

Since one of the very purposes of pretrial is to consider the necessity or desirability of amendments to the pleadings (F.R.C.P., Rule 16) we submit that the trial court abused its discretion in denying plaintiff the right to introduce the issue into the case.

CONCLUSION

Appellant respectfully but earnestly submits that it is entitled to a jury trial on the merits of its claims (1) that defendant breached its agreements to take plaintiff's business, thereby causing plaintiff's damage, and (2) that it did so wantonly breach its fiduciary obligations as to call for punitive damages.

In the event that this court returns the case for determination by the jury of the above issues the Robinson-Patman issue should then be allowed, in conformity with the oft-expressed rule that a case should not be disposed of piecemeal.

Dated, San Francisco, California,
August 5, 1968.

Respectfully submitted,
SULLIVAN, ROCHE, JOHNSON & FARRAHER,
Attorneys for Appellants.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GERALD J. O'CONNOR,

Attorney for Appellants.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PSG CO., a corporation,
and PHILIP S. GREENBERG,

Appellants,

v.

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.,

Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon

THE HONORABLE ROBERT C. BELLONI, Judge

Statement of Issues Presented for Review

The broad question raised by appellants (herein collectively called Greenberg) on this appeal is: Did the trial court err in dismissing Greenberg's cause of action for the alleged loss of future profits resulting when appellee (herein called Merrill Lynch) as a broker declined to accept further employment by Greenberg for the placement of orders for new sugar futures contracts?¹

¹ For a discussion of terms used in the commodity market, see Appendix A.

The principal substantive issues are:

1. In the absence of agreement, is the broker-customer relationship as to the placement of new contracts in the sugar future commodity market terminable immediately at will by either party upon the giving of notice?

2. Was there evidence of a binding agreement between Merrill Lynch and Greenberg which obligated Merrill Lynch to continue to place orders for new sugar futures contracts?

3. If there was no evidence of such binding agreement, was there evidence of a promise and reliance thereon which obligated Merrill Lynch under the doctrine of promissory estoppel to continue to place new orders for Greenberg after notice and until Greenberg obtained another broker?

4. Did Greenberg produce any probative evidence of damages resulting from the refusal of Merrill Lynch to accept further employment by Greenberg to place orders for new sugar future contracts?

Other issues raised by Greenberg are:

a. Was a procedural error committed by the trial court in granting Merrill Lynch's motion "for dismissal" upon the conclusion of Greenberg's case in chief?

b. Was Greenberg's claim for punitive damages properly removed by the trial court from the consideration of the jury?

c. Did the trial court abuse its discretion in refusing permission to Greenberg to amend his pleadings to assert a claim for violation of the anti-trust laws?

Statement of the Case

Merrill Lynch deems the statement of the case by Greenberg to be inaccurate and incomplete, and therefore makes the following statement:

A. Nature of the case.

This is an action by Greenberg against Merrill Lynch, a stock and commodities broker, for breach of contract.

In the pretrial order (which by stipulation superseded the pleadings in this case), Greenberg contended that in March, 1965, he entered into an agreement with Merrill Lynch whereby Merrill Lynch agreed to place Greenberg's orders to purchase or sell sugar futures contracts up to stated maximum limits. (R.60) Greenberg claimed that there was a custom in the industry to give reasonable advance notice before reducing such trading limits, and that Merrill Lynch wrongfully terminated the agreement in October, 1965, by refusing to place new orders without giving him reasonable advance notice. (R. 61, 62)

Greenberg asserted that by reason of Merrill Lynch's refusal to place orders for new transactions, Greenberg was prevented from making profits on such transactions, and that Merrill Lynch's conduct in terminating the agreement was such as to entitle Greenberg to exemplary damages. (R. 62)

Merrill Lynch contended that it was under no obligation imposed by law to continue its employment as a broker for the placement of orders by Greenberg, and that there was no express or implied contract which obligated it in any way to continue to place orders to purchase or sell sugar futures contracts for

Greenberg. Merrill Lynch further contended that regardless of whether or not it breached a duty owed to Greenberg, Greenberg did not incur any damages. (R. 64)

Both Greenberg and Merrill Lynch made contentions as to certain other claims, but such claims were settled by agreement and are not involved in this appeal.

In the pretrial order Greenberg did not make any contention with respect to a claim against Merrill Lynch under the Robinson Patman Act. (R. 60-63)

B. Course of proceedings and disposition in trial court.

The cause proceeded to trial before a jury on the issues framed by the pretrial order.

At the end of the first day of trial the court, after inquiring of Greenberg's counsel as to his evidence on the punitive damage issue, granted Merrill Lynch's pretrial motion to remove the issue of punitive damages from the case. (Tr. 107-113)

At the conclusion of Greenberg's case, the court granted Merrill Lynch's motion "to dismiss" Greenberg's claim. (Tr. 270) The parties thereafter disposed of their remaining claims against each other by stipulation.

In ruling on the motion, the court remarked that there was no evidence under which the jury could conclude that Merrill Lynch had promised that any "limits" it fixed would continue for any period. (Tr. 269)

The court noted that the testimony with respect to the custom of the industry in giving notice in these circumstances was not helpful to Greenberg's case. (Tr. 269) Although there

was testimony that when "limits" are reduced by a broker a reasonable time is given a customer to liquidate, Greenberg's testimony also was that a reasonable time to liquidate had been given. (Tr. 269) On the issue of whether a broker can decline to accept employment to place further orders for new commodity future contracts, Greenberg's "expert" testified that in his own experience a broker can decline to accept employment for the placement of new orders any time. (Tr. 150)

The court concluded that even though there was no express agreement between the parties it might be possible to find that Merrill Lynch's promise to "carry" up to 300 contracts "open" for Greenberg was binding on the theory of promissory estoppel, but that under Greenberg's evidence Merrill Lynch had not promised to hold the "limits" open forever--the "limits" could be terminated in accordance with the custom of the trade, and there was no evidence that they were terminated in any other way. Accordingly, the court granted the motion on the ground that there had been no breach of agreement and on the further ground that the evidence of damages based on loss of future profits was purely speculative.

C. Statement of facts.

Philip Greenberg is the sole stockholder and principal officer of PSG Co. (R. 49) Since 1963, both Philip Greenberg and PSG Co. (together referred to as Greenberg) have been engaged in the business of buying and selling "futures" contracts on the commodity exchanges. (R. 49) In addition, Greenberg has handled actual shipments of sugar from the Association of

Guatemala Sugar Producers and El Salto, SA, for the United States and the world markets. (R. 49) Greenberg's operations with the above-named sugar producers involved the sale and delivery of "actual" cargoes of sugar. (R.49)

In October, 1963, Greenberg became a member of the New York Coffee and Sugar Exchange. (R. 49)

Merrill Lynch is a securities and commodities broker. It is a member of the New York Stock Exchange as well as of the principal commodity exchanges in the United States, London and world markets. (R. 50) As a broker, Merrill Lynch's business is to place orders received from its customers for the purchase and sale of securities or futures contracts on the exchanges where they are traded. (R. 50) In its commodity operation, Merrill Lynch derives its income solely from the commissions which it charges for the execution of customers' orders. (R. 50)

The New York Coffee and Sugar Exchange, Inc. (hereinafter referred to as Exchange), is a corporation organized pursuant to the laws of the State of New York. (R. 50) Among other things, it provides a market place for trading coffee and sugar futures contracts. The New York Coffee and Sugar Clearing Association, Inc. (hereinafter referred to as Clearing Association) is a New York corporation organized to clear and settle trades made on the Exchange. (R. 50)

The Exchange sets certain minimum margin requirements which customers of clearing members must maintain. (R. 51) A clearing member is a member of the Exchange who is also a member of the Clearing Association. (R. 51) Merrill Lynch, at all relevant times, was a clearing member of the Exchange. (R. 51)

In 1963 Greenberg opened accounts with Merrill Lynch for the placement of orders for the purchase and sale of stocks and commodities on margin. (R. 53, 54) In opening the accounts, Greenberg executed a hypothecation (lending) agreement. (R. 52-53)

At no time during the course of opening his accounts or thereafter did Greenberg tell Merrill Lynch that he would not trade with any other broker (Tr. 186), or that he would place any particular amount of business through Merrill Lynch. (Tr. 187) Greenberg did not tell Merrill Lynch that he would not give another broker all or part of his commodity business (Tr. 187), and the period of time Merrill Lynch was to act as Greenberg's broker was never discussed or defined. (Tr. 187)

At the time Greenberg's accounts were opened in 1963, Merrill Lynch informed Greenberg of the account "limits," i.e., the number of sugar futures contracts it would "carry" on "margin" at any one time in plaintiff's accounts. The "limits" were revised upwards by Merrill Lynch at various times, and by 1965 the "limits" on plaintiff's combined accounts were 100 contracts "straddled" and 100 contracts "open." (Tr. 20, 22)

In late 1964, Greenberg, through Merrill Lynch as broker, began purchasing May 1965 No. 8 sugar futures contracts. (R. 54) Greenberg conferred with his account executive at Merrill Lynch in Portland, Oregon, on several occasions starting in late 1964, in connection with the transaction, and told him that he intended to take actual delivery of sugar represented by commodities contracts purchased through the Exchange in order to

fill the import quota of certain Guatemalan companies he was representing in the United States. (Tr. 28) Ultimately, after several discussions, Greenberg stated that he would need sugar represented by 300 contracts to import into Guatemala. Merrill Lynch told him it would handle the matter and "take delivery." (Tr. 29) As it developed, Greenberg finally acquired 284 such contracts.

Greenberg held the 284 contracts of May 1965 No. 8 sugar until the last day for trading in the May 1965 contract expired. Delivery notices were then issued for the 284 contracts of May 1965 No. 8 sugar. By such delivery notices, under the rules of the New York Coffee and Sugar Exchange, such contracts were removed from trading, and Greenberg became obligated to accept delivery of the sugar covered by the 284 contracts (14,200 long tons of raw sugar). (R. 54-55)

On June 8, 1965, Greenberg transferred 196 of such contracts in connection with a sale of actual sugar to Amerop, another firm engaged in the sugar trading business. (R. 55) On June 10, 1965, Greenberg sold an additional 48 of the 284 contracts, leaving only 40 as to which Greenberg was obligated to accept delivery. (R. 55) Thereafter, on June 16, 1965, Greenberg sold "short" 40 July 1965 No. 8 sugar contracts and re-tendered the sugar represented by the remaining 40 contracts of May sugar in satisfaction of his obligations to deliver July No. 8 sugar. (R. 55)

When Greenberg was in New York, on June 7, 1965, he visited Merrill Lynch's offices. Greenberg met Mr. Cassady, the

head of Merrill Lynch's Commodity Department, for a few minutes.

Greenberg testified as to this conversation with Mr. Cassady:

"Q All right. I want you to tell the jury as near as you can what each party said of the three of you at that meeting?

"A I -- Mr. Cassady introduced me to Mr. Frommer, and he discussed my last trip and the current trip. And the next inquiry was, 'What are you going to do about the sugar, the cash sugar?' I said, 'Well, we transferred it off yesterday, 196 lots.' Mr. Frommer smiled, shook hands, and said, 'That's all I want to know,' and out he walks. Mr. Cassady invited me to sit down. He had his couch there, and we started discussing it; and he discussed, as I recall, that he was from Indiana, and wanted to know if every thing was all right. I said, 'Fine.' He asked me if Portland was taking good care of me, and I said 'Yes.' He asked me if my limits of 300 were satisfactory. I said, 'Yes, they were.' And he said, 'Fine.'" (Tr.41)

(The foregoing apparently is the prime evidence relied on by Greenberg to support his theory of promissory estoppel.)

During the summer of 1965, Greenberg continued to place orders for the purchase and sale of sugar futures contracts with Merrill Lynch, and Merrill Lynch continued to accept and execute those orders. (R. 56) Beginning in August, Greenberg's accounts increased rapidly in size so that by October the number of future contracts in the accounts was far in excess of the "limits" which existed in early 1965. (R. 56)

On the evening of October 21, 1965, Richard Emlaw, the Merrill Lynch account executive in Portland, Oregon, who handled Greenberg's accounts, unsuccessfully attempted to contact Greenberg by telephone. (R. 57) Emlaw met Greenberg the following morning at about 6:15 and told him that effective immediately Merrill

Lynch was going to limit Greenberg's accounts to liquidating orders only until the number of contracts in his accounts was reduced to 100 "open" and 100 "straddled." (Tr.48) On that date Greenberg's position was 190 contracts "straddled" and 207 contracts net "open" long; i.e., 587 contracts, of which 397 were "long" and 190 were "short."

After Greenberg received the oral notice from Emlaw, he requested that the position of Merrill Lynch be placed in writing. Joseph J. DuLong, the manager of Merrill Lynch's Portland office, thereupon confirmed Merrill Lynch's position that it would decline to accept orders for new sugar futures contracts until the "limits" of 100 "straddle" and 100 "open" contracts were reached but that it would continue to handle any orders which Greenberg desired to place to liquidate his existing contracts. (R. 57-58)

After such notice and until November 3, 1965, Greenberg attempted to place various orders for new sugar futures contracts with Merrill Lynch, but such orders were declined. These orders were never placed by Greenberg with another broker. (Tr. 51-54) Miss O'Connor, Greenberg's secretary, testified that if the orders had been accepted and executed by Merrill Lynch the paper book value of such orders, valued as of November 1, 1965, would have appreciated by \$45,821. (Tr. 220-223)

On November 3, 1965, Greenberg commenced to purchase and sell sugar futures contracts through Francis I. duPont & Co. (Tr. 65)

Greenberg continued after the notice of October 22, 1965, to place liquidating orders for the purchase and sale of his existing sugar futures contracts with Merrill Lynch until February 10, 1966. On February 10, 1966, the remaining sugar futures contracts in Greenberg's accounts were transferred at Greenberg's request to Greenberg's new broker. (R. 58)

Argument

A. Summary of argument.

1. The trial court did not err in directing a verdict for Merrill Lynch at the close of Greenberg's case in chief because:

a. Greenberg presented no evidence of a contractual obligation requiring Merrill Lynch to continue as a broker for Greenberg for the placement of orders for new sugar futures contracts.

b. Greenberg presented no evidence sufficient to support Greenberg's theory of promissory estoppel.

c. Greenberg presented no evidence sufficient to support Greenberg's claim that Merrill Lynch breached any duty which it owed to Greenberg.

d. Greenberg presented no evidence of compensable damages.

2. The trial court did not err in removing the issue of punitive damages because:

a. Exemplary damages may not be awarded for breach of contract.

b. No fiduciary relationship existed between Greenberg and Merrill Lynch.

c. There was no evidence of malice or of aggravating circumstances.

3. The trial court did not abuse its discretion in denying Greenberg's motion to amend his complaint to add a claim for violation of the anti-trust laws because:

a. The motion was made 19 months after the complaint was filed and at a time when the issues had been framed, discovery completed and the case set for trial the following month.

b. The proposed amendment was not in any way connected with the issues then framed.

c. Greenberg would not be prejudiced by the denial of the motion.

B. Contentions and argument of Merrill Lynch.

POINT I

THE TRIAL COURT PROPERLY DIRECTED A VERDICT FOR MERRILL LYNCH AT THE CLOSE OF GREENBERG'S CASE IN CHIEF.

1. Merrill Lynch's motion was properly treated as a motion for a directed verdict under Rule 50A.

At the close of Greenberg's case, counsel for Merrill Lynch moved "for the dismissal" of Greenberg's claim for breach of contract (Tr. 248) and stated specific grounds therefor. (Tr. 249) The court granted the motion (Tr. 270) and thereafter entered a form of judgment reciting that Merrill Lynch had moved the court for a directed verdict and that such motion was granted. (R. 87-88)

Greenberg argues that the court's action was procedurally improper because a "motion to dismiss" may be granted only in a nonjury case. Greenberg asserts that, even were the motion available in a jury case, the court failed to make specific factual findings required by Rule 41(b), FRCP, and consequently there is no support for the judgment.

Greenberg's argument boils down to the claim that the district court should be reversed because counsel did not use the magic words "directed verdict" in making the motion. The fact that Greenberg finds it necessary to assert this argument is a strong indication that Greenberg's search for legitimate grounds for appeal went unrewarded, for it is well settled that a motion for dismissal made in a jury case may properly be treated as a motion for a directed verdict under Rule 50A. See e.g.,

Wolf v. Reynolds Electrical &
Engineering Co. (9 Cir, 1962)
304 F2d 646

Carroll v. Seaboard Air Line
Railroad Company (4 Cir, 1967)
371 F2d 903

The argument that the district court erred in failing to make factual findings is likewise totally without basis in the law. It would have been improper for the district court to make findings in a jury trial.

Wolf v. Reynolds Electrical & Engineering Co., supra, at 648-649

"Where a motion for dismissal is made pursuant to Rule 41(b) in a jury case, it may properly be treated as a motion for a directed verdict under Rule 50(a). The trial court does not determine the facts, but simply

determines whether plaintiff has made a 'case for the jury'. He does not weigh the evidence, draw inferences therefrom, or evaluate the credibility of witnesses, as he may do in a nonjury case where the judge is the trier of the facts. The procedural error of the trial court in making findings of fact in this case may be disregarded in view of the court's conclusion that there was 'no evidence that defendants, or either of them, were negligent in the operation of their truck and trailer, and upon that ground plaintiff's complaint should be dismissed * * *'. If this conclusion is correct, the judgment must be sustained as a matter of law." (emphasis supplied)

The cases cited by Greenberg are not contrary to the principles stated above. See

Mateas v. Fred Harvey
(9 Cir, 1945) 146 F2d 989

Young v. United States
(9 Cir, 1940) 111 F2d 823

Both Mateas and Young were tried to the court without a jury. In Mateas, the court's oral remarks were taken by the appellate court as findings, though findings should have been made as contemplated by Rule 52A of the Federal Rules of Civil Procedure. In the Young case, findings were made by the trial court and were upheld on appeal. Thus, these cases simply restate the requirements of Rule 52 that, in cases tried without a jury, the court should make findings of fact.

The remaining case cited by Greenberg

Guerrero v. American-Hawaiian Steamship Company (9 Cir, 1955)
222 F2d 238

is hardly relevant here. In that case, this court properly held that a district court could not determine disputed issues of fact, based upon evidence presented at a jury trial, after the

jury had been dismissed for failing to reach a verdict. It has no bearing here because the district court did not make findings after dismissing the jury, but simply determined that there was no factual issue to submit to the jury.

2. In the absence of agreement, Merrill Lynch was entitled at any time to decline to accept orders for new sugar futures contracts.

Greenberg's claim of procedural error has been used to set up a circuitous argument on which to base an attack on the district court's disposition of the substantive issues. Greenberg's argument runs that factual findings should have been made by the trial court; that in the absence of formal findings the comments of the court can be taken as findings; and that the trial court cannot make findings of fact in a jury case unless there is no evidence on which a jury could base a contrary finding. (Appellant's Brief 7-8)

The net proposition advanced by this argument appears to be that the district court erred in taking the case from the jury if there was a scintilla of evidence to support Greenberg's claims. That proposition, however adroitly presented, is incorrect. The federal courts have long since abandoned the scintilla test, and have ruled that verdicts may properly be directed where there is no controverted issue of fact on which reasonable men could differ.

Brady v. Southern R. Co. (1943)
320 US 476, 88 L ed 239

Shafer v. Mountain States Tel. &
Teleg. Co. (9 Cir, 1964) 335 F2d 932

There is no question but that the "reasonable man" standard was the proper standard to use in this case, and that it was correctly applied by the trial court. The trial court did not attempt to determine disputed issues of fact. It simply ruled that there was no evidence of breach of contract and no evidence of damages. In so ruling, the district court correctly determined that under familiar principles of agency law the relationship between Greenberg and Merrill Lynch was terminable at will, and that Greenberg had failed to produce evidence of any contractual undertaking to vary the general principles of law.

Under established principles of agency law, Merrill Lynch clearly was under no obligation to place orders for new purchases or sales of sugar futures contracts for Greenberg. A broker has an obligation to carry out an order for his customer only if he has accepted and agreed to execute the particular order. When the particular order is completed, however, the relationship comes to an end and the broker has no further duties. Thus, a broker may decline future employment at any time without prior notice, even though he has carried out a previous series of transactions for his customer.

Meyer, Stockbrokers and Stock Exchanges, Section 44, pages 263-264

"The first step in the execution of an order is the employment of the broker by the customer for that purpose. There can be no agency without employment. A broker may not execute an order on behalf of a customer without the customer's authority, and if he does so the customer may repudiate the execution.

"In the same way the customer cannot compel the broker to execute an order, the broker having the right to decline employment. However, if the broker is carrying a marginal account for the customer, he must, if he wishes to decline the agency, give the customer prompt notice of declination. Notice in such a case is required because the broker has already accepted employment, and must therefore follow his principal's instructions unless he elects to bring the employment to an end, in which case he must give proper notice of such election. But if there are no transactions pending between the broker and the customer at the time, the broker is not under a duty to give notice of declination, even though there had been transactions pending at an earlier date.

"Employment of the broker by the customer may be created by the customer giving the broker an order and by the broker executing it or agreeing to execute it. This in fact is the manner in which a broker ordinarily is employed." (emphasis added)

There was no order pending from Greenberg on October 22, 1965, when Merrill Lynch gave notice that it would not place further orders for new contracts. Greenberg thereafter attempted to place orders for new contracts which Merrill Lynch declined to accept. Because notice of declination was given before Greenberg attempted to place such new orders, there was no factual issue as to whether Merrill Lynch had given prompt notice.

Even if Greenberg had placed an order before notice was given, the broker-customer relationship could have been effectively terminated by giving immediate notice of declination. Such notice to be effective must only be transmitted by means as rapid as that by which the order was given.

The United States Supreme Court, in discussing the rights of the parties with respect to a brokerage account on margin, stated in

"* * * A broker is but an agent, and is bound to follow the directions of his principal, or give notice that he declines to continue the agency. * * * The plaintiff should have given prompt notice that he objected and declined to make the change." (p. 198)

The fact that Greenberg had a credit balance in his accounts and that Merrill Lynch had acted as his broker on prior occasions does not modify the principle that Merrill Lynch had no obligation to place future orders. Each order submitted by a customer to a broker, even if there is a credit balance in the customer's account with the broker, is nothing more than an offer to enter into an agency relationship, which the broker is free to decline. See Meyer, supra, Vol. 2, wherein the author states at page 103, footnote 2, citing Blyth v. White (Ga, 1934) 176 SE 830:

"A broker is not obligated to accept an order of a customer for execution, even if the customer has a credit balance with the broker."

To the same effect see

Robinson v. Ungerleider (Pa, 1933) 169 A 886, 887-888

In the Robinson case, plaintiff placed an order with defendants for the purchase of various stocks, and stipulated the prices at which purchases were to be made. Some \$16,000 in bonds was deposited with defendants to secure the loans necessary at the time the order was given.

On October 29, 1929, the day of the Great Panic, defendants notified plaintiff that they would not carry out his order and that they had canceled it. At the time defendants

gave notice of cancellation, only one stock had reached plaintiff's stipulated purchase price. In holding that the defendants' agency had been properly terminated, the court stated,

"Agency is a voluntary relationship, and may generally be terminated at will by either party. 'Where the agency is indefinite in duration the agent may, upon giving reasonable notice, sever the relation at any stage without liability to the principal.' Mechem on Agency, p. 456. Meyer (p. 263) recognizes the right of the broker to decline to execute an order at any time upon giving prompt notice. This is true even in those cases where the broker is carrying a marginal account for the customer.

"The reports contain few cases of a refusal by the broker to execute an order. In most of the cases, the broker has neglected to execute the order and has not given notice that he refuses to do so. The reason for this is apparent from a consideration of the fact that the broker's only compensation accrues from his commission when the transaction is made. * * * It has always been recognized that the customer or principal may cancel an order or withdraw his authority at any time before the order is executed, and this is true whether the contract covers real estate, stocks, or other property. Coffin v. Landis, 46 Pa. 426, 433; Sibbald v. Bethlehem Iron Co., 83 N.Y. 378, 38 Am. Rep. 441; Matter of Dickinson, 171 App. Div. 486, 157 N.Y.S. 248. It would seem equitable to allow the agent the same privilege to refuse to execute an order as is possessed by the principal. The defendant in the instant case gave immediate notice to the plaintiff by telephone of its decision to refuse the order, and the plaintiff's collateral was returned to him the same day upon request." (emphasis added)

See also

Busch v. L. F. Rothschild & Co. (1965) 259 NYS2d 239, 240

"* * * A stockbroker is an agent for the customer. Unless he accepts the agency he has no duty to execute any order and may refuse to do so (Meyer, Law of Stock Brokers and Stock Exchanges, vol. 1, p. 249). The relationship is not changed by the fact that there is a margin account. The duty in such case is to give prompt notice that the order is refused." (emphasis added)

Greenberg cites certain authorities which, on first blush, appear to take a conflicting position. In fact, such cases deal with the relationship of pledgor-pledgee, which is not in issue here, and they are for that reason of no support for Greenberg's position.

A broker and his customer may enter into a number of relationships in the course of their dealings, some of which are terminable at will without notice and some of which may only be terminated with reasonable notice.

Meyer, Law of Stockbrokers and
Stock Exchanges, Section 41(3)

The claim asserted in the case at bar was for loss of future profits on new purchases or sales Greenberg claimed he would have made had Merrill Lynch placed his orders, and not for wrongful disposition of commodities contracts presently held in his accounts. Greenberg's trial counsel admitted that no claim for conversion was being asserted in this case, and Greenberg testified that Merrill Lynch had not forced him to liquidate and had given him a reasonable time to reduce his accounts and transfer his contracts to his new broker. Even if this had been a case for conversion or wrongful sale, Greenberg expressly waived any such notice requirement when opening his accounts with Merrill Lynch. (R. 52-53) Accordingly, we are not concerned in this case with the pledgor-pledgee relationship, but solely with the broker-customer relationship.

In summary, the law requires only that the broker give prompt notice of declination of an order. The duty to give

"prompt" notice is satisfied if it is transmitted by a means as rapid as that by which the order was transmitted from the customer to the broker. Cf.

Galigher v. Jones, supra

See,

Meyer, supra, Section 47,
page 268

As the relationship of broker-customer is terminable immediately upon notice, Greenberg had the burden of establishing a contractual undertaking on the part of Merrill Lynch which varied the established principles of agency law and imposed a duty to continue to act as broker for a particular period of time.

We turn now to the question of whether the evidence shows such contractual undertaking on the part of Merrill Lynch.

3. Greenberg presented no evidence of any express or implied agreement obligating Merrill Lynch to accept Greenberg's orders.

Greenberg undoubtedly realized that the relationship between broker and customer terminates with the execution of each order, and that he was obligated to show that any continuing obligation on the part of Merrill Lynch to place his orders could only arise from contract, for his pretrial contentions alleged the breach of a specific contract.

(R. 60-61) At trial, however, Greenberg expressly conceded that there was no evidence of such agreement. (Tr. 251)

The renewed argument on this appeal that there was an agreement between the parties flies in the face of the facts, and of Greenberg's admissions at trial. Greenberg's concession recognized that the testimony he had been given "limits" of up to 300 "open" contracts in his accounts could at best only be construed as a promise to accept and execute orders from time to time, and that such "promise" could not have risen to the dignity of an enforceable promise or contract because of a complete want of consideration. See

1A Corbin on Contracts,
Section 157, page 40

The "promise" to carry up to 300 contracts in Greenberg's account, of course, is most accurately characterized as an offer which empowered the offeree (Greenberg) to create a series of separate contracts. The mere sending in of an order, however, did not make the offer irrevocable as to future orders.

An offer to place future orders could have been made an enforceable promise only if some consideration had been bargained for and given in exchange. A bilateral contract, instead of an offer to enter into a series of contracts, could have been formed if Greenberg had paid a sum of money for the promise, had agreed to place a minimum number of contracts, or had agreed to place his orders exclusively with Merrill Lynch. Compare

Meier Dental Mfg. Co. v. Smith
(8 Cir, 1916) 237 Fed 563

Kelp Ore Remedies Corp. v.
Brooten, et ux (1929)
129 Or 357, 277 Pac 716

with

Rafolovitz v. American
Tobacco Co. (1893)
25 NYS 1036

In the absence of any such promise or consideration, the supposed agreement was so lacking in mutuality of obligation that it could be canceled at will by either party, and its "termination" by Merrill Lynch created no liability for damages.

During the course of the trial, the following colloquy occurred between the trial judge and Greenberg's trial counsel:

"THE COURT: Have you abandoned your preliminary theory that there may have been some quid pro quo offered by way of a bilateral promise?

"MR. JOLLES: Yes." (Tr. 251)

In light of such admission, the representation in Greenberg's appeal brief that the parties stipulated in the pretrial order that Merrill Lynch had agreed to accept orders from Greenberg to buy and sell sugar futures contracts up to a maximum of 300 contracts open at any one time is a particularly glaring misstatement of the record. (See Appellant's Brief, page 11, statement 9) In fact, the supposed "stipulation" is found in Greenberg's "Contentions," and not in "The Statement of Agreed Facts." (R. 60)

Greenberg's attempt to now resurrect the abandoned contention of a "binding contract" seems strangely misplaced, particularly in light of the evidence, or lack of evidence, on this phase of the case.

We conclude that Greenberg's trial counsel properly appraised his evidence when he informed the court that he was no longer relying upon a theory of a breach of an express or implied agreement.

4. Greenberg presented no evidence sufficient to create a jury issue under Greenberg's theory of promissory estoppel.

In the absence of a promise supported by ordinary consideration, Greenberg necessarily was forced at the trial to rely on a substitute for consideration.

The contention that Merrill Lynch's "promise" was made enforceable by some consideration substitute was not put in issue by pleadings or by contentions in the pretrial order. (R. 1-6, 60-63) At trial, when Greenberg conceded that there was no agreement and sought to change his ground from express agreement to promissory estoppel, Merrill Lynch objected. (Tr. 126-127) Thus, Merrill Lynch submits that the issue of promissory estoppel is not properly in this case, and could not have served as a basis for sustaining Greenberg's claims.

Although Merrill Lynch believes that the promissory estoppel theory finally advanced by Greenberg in lieu of

proof of an express agreement is not in this case, a discussion of this contention is necessary to an understanding of the trial court's disposition of Merrill Lynch's motion for directed verdict.

The trial court clearly indicated that it understood the law to be that the relationship between broker and customer is terminable at will upon immediate notice (Tr. 250), and that Greenberg therefore had the burden to show that the parties had modified the usual relationship by contract (Tr. 268-270). After Greenberg conceded that there was no agreement, the court noted that, taken at best, all the jury could conclude from the evidence was that Merrill Lynch had promised it would place up to 300 contracts "open" for Merrill Lynch, and that Greenberg in fact during 1965 had built up his position above the level of 100 contracts "open." (Tr. 269) However, in order to vary the basic principle of law that the broker-customer relationship is terminable at will upon immediate notice, Greenberg was required to show that there was an implied term in such relationship, adopted by reference to custom or practice in the industry, that the relationship was not terminable at will, but continued for a "reasonable" time. Thus, the crux of the matter, after the smoke from all the other claims had blown away, was whether Greenberg's expert testimony was sufficient to establish such custom.

The district court's remark that the expert testimony on this issue had not been very helpful (Tr. 269) is an under-

statement. In fact, Greenberg's expert, Mr. Engelmohr, stated, as an example of the kind of notice he thought customary in the industry, that he had done the very thing Greenberg accused Merrill Lynch of doing--that he had had occasion to "kick a man out" of his brokerage firm and ask him not to do business any more, and had immediately limited this customer's account to liquidating orders only without any other notice. (Tr. 132, 145) Greenberg's expert further stated that a broker can reduce "limits" any time it wants (Tr. 150), and that it can refuse orders (Tr. 141, 150), although it does not like to do so under normal circumstances.

The testimony of this "expert" (Engelmohr admitted that he did not consider himself an expert in the field--Tr. 140) not only failed to provide any evidence sufficient to go to the jury on the issue of notice, but in fact was completely destructive of the contention that notice was required. Mr. Engelmohr's whole testimony is commended to the court as an illustration of the fact that even expert witnesses do not always testify so as to permit inferences favorable to the party by whom they are called.

Even if Mr. Engelmohr had testified in support of Greenberg's contentions, the claimed breach of an "established custom" to give notice of an intent to decline future orders would not have supported any claim for the recovery of damages.

Blyth v. White (Ga, 1934) 176 SE 830, 832

"In count 1 damages are alleged for loss caused by the acts of the defendants in closing plaintiff's account and refusing to further execute orders given by the plaintiff. While it is alleged that the defendants' refusal to pay the plaintiff the money in their hands belonging to the plaintiff was the direct and proximate cause of the plaintiff's loss, the plaintiff, in this court, is not seeking to recover that money as such. He is seeking to recover speculative damages for loss growing out of the defendants' refusal to further act as his brokers. It is nowhere alleged that there was any contract between the parties. While there are alleged facts which are evidentiary of a contract, there is alleged nothing tending to establish an obligation on the part of the defendants to continue as plaintiff's brokers, or to accept orders from the plaintiff for the sale and purchase of stocks, or to continue the purchase of unissued stocks without requiring the plaintiff to make any advances therefor. It is not alleged that the acts of the defendants complained of constituted a breach of a contract. It is alleged only that the acts of the defendants constituted a breach of 'established customs.' Count 1 of the petition therefore fails to set out any cause of action for the recovery of the loss or damage there alleged. For the same reason it does not appear from the allegations in count 4 that the defendants were under any obligation to accept any orders from the plaintiff. The allegation in this count that the defendant committed a breach of contract in refusing to execute the plaintiff's offer to buy stock failed to set out a cause of action." (emphasis added)

The evidence of other important elements necessary to create a promissory estoppel are also lacking. There was no evidence from which the jury could have found that Merrill Lynch promised to place orders for Greenberg up to 300 "open" contracts. The sole evidence of any such promise consisted of:

(a) Greenberg's discussions with Richard Emlaw, Greenberg's account executive, and Joseph DuLong, manager of Merrill Lynch's office in Portland, in connection with a specific transaction contemplating acceptance of delivery of up to 300 May 1965 contracts for import

into Guatemala. (See admonitions of trial judge to Greenberg, Tr. 28-32)

(b) Greenberg's single conversation with Thomas Cassady in New York when the parties were again discussing the delivery of actual sugar represented by the May 1965 contracts. (Tr. 41)

Nowhere was there any specific evidence to which Greenberg can point that the 300 contracts "open" limits discussed in those conversations had to do with anything other than the specific transaction then in progress involving importation of sugars into Guatemala.

Mr. Engelmohr's testimony was also destructive of the claim that "limits" set by a broker are in any way the subject of agreement. He testified that account "limits" are not agreed upon between broker and customer (Tr. 149), but that the broker, because of his exposure to liability for his customer's account (Tr. 143-144), makes the decision as to the size of account it wants to carry for a customer. The broker's decision is not a "two-way" street (Tr. 149), and the broker can reduce "limits" or even refuse orders (Tr. 150).

In summary, Mr. Engelmohr's testimony completely refutes the idea that notice was necessary in this case, or that there was any custom in the industry to give notice. It also negatives the concept that a broker's statement of the "limits" it will establish for an account is to be construed as a "promise" in any sense.

Under the evidence in this case, there was no promise upon which Greenberg could reasonably rely to continue to accept orders and do business. Even assuming, arguendo, that the elements of a promissory estoppel had been present, this frail substitute for a regular contract did not contain any term requiring Merrill Lynch to continue the relationship for any period of time. As the relationship was terminable at will, Merrill Lynch was not guilty of any breach of contractual duty in so terminating.

5. Greenberg's evidence does not support Greenberg's claim that Merrill Lynch breached any duty owed Greenberg.

In order to present the issues in this case in logical fashion, we have not attempted to answer each claim in Greenberg's brief in support of his contention that the evidence shows a breach of duty owed Greenberg by Merrill Lynch (See Appellant's Brief, paragraphs 1-11, pages 8-12) but have heretofore discussed the basic issues.

In answering these issues, we have necessarily discussed some, but not all, of the miscellaneous statements of the evidence claimed favorable to Greenberg. This section will answer the remaining claims of Greenberg as to the evidence which the jury might have considered.

Statement No. 1, page 8.

Greenberg did not testify that it was the custom of the trade to give notice under the circumstances involved here. Greenberg's testimony, read as a whole, was that he based his contention that notice was required on "just good common business

sense" (Tr. 192-195). No attempt was made to qualify Greenberg as an expert witness on this or any other matter, and his opinion has no more dignity as evidence of a custom in the industry than that of any other lay person.

Statement No. 2, page 8.

The statement that Greenberg testified without objection that it was understood between the parties that proper notice would be given does not accurately represent the testimony. Greenberg actually admitted that there had never been any discussion as to how long the limits of 300 contracts open would continue in effect and that the "proper notice" element was assumed by him but never discussed with Merrill Lynch (Tr. 92).

Statement No. 3, page 8.

Greenberg's purported "expert" admitted that he was not an expert in the field (Tr. 140). With respect to the custom and practice in the industry, Mr. Engelmohr testified that he had once had occasion on behalf of his brokerage firm to "kick" a customer out, ask him not to do business any more, and limit his account to liquidation trading only (Tr. 132). On cross examination, Mr. Engelmohr admitted that he had not given that particular customer any advance notice that the brokerage firm would handle only liquidating orders (Tr. 145). This testimony, of course, was completely contrary to the alleged custom of the trade which Greenberg claimed was regularly followed.

Statement No. 4, page 9.

In response to a hypothetical question, Mr. Engelmohr testified that he had not had any experience with a customer under circumstances similar to those in the case at bar, and that he could not conceive of its happening (Tr. 136). The misleading inference from Greenberg's brief is that Mr. Engelmohr testified in effect that Merrill Lynch's action was so wrongful and arbitrary that it was simply inconceivable that such a thing could be done. The whole tenor of the testimony, however, was simply that Mr. Engelmohr had never had any experience with the circumstances presented by the hypothetical.

Statement No. 5, page 9.

Mr. Engelmohr did not testify, as Greenberg suggests, that he had never in all his experience encountered such an act as Merrill Lynch committed, but simply that he had never had direct experience himself in a case like this (Tr. 159, lines 2-3) and had never had the experience of a brokerage house reducing an account below agreed-on "limits" (Tr. 152).

Statement No. 6, page 9.

Joseph Frommer testified that it was not the practice in the industry to force somebody within a day or two to "move out" of a large position (Tr. 214, lines 21-23). Mr. Frommer's testimony does not support Greenberg, for Greenberg was not forced to liquidate or "move out" of the position he then held. Merrill Lynch simply refused to accept and execute orders for

new contracts which would increase the size of his position. Greenberg himself admitted that he had been given adequate time to reduce his existing position (Tr. 198).

Statement No. 7, page 9.

Greenberg's contention as to notice requirements imposed by law has heretofore been discussed in this brief, pages 24 through 29.

Statement No. 8, page 10.

The argument advanced in this section has been discussed at some length in the previous section on promissory estoppel. As the trial court noted, the best that could be said for this evidence is that the jury might infer there was some kind of a promise and that Greenberg relied thereon. There was no evidence, however, whether by proof of custom in the trade or by express agreement, that such "promise" would remain in effect for any stipulated period of time (Tr. 269).

Statement No. 9, page 11.

The parties did not "agree" in the pretrial order that Merrill Lynch had agreed to accept up to a specified number of orders from Greenberg. Instead, the quoted statement is a "contention" which Greenberg made and admittedly failed to prove (Tr. 251).

Statement No. 10, page 11.

The statement quoted by Greenberg is patently out of context and does not accurately reflect any finding of the district court. The court's statement was made in the course of a discussion of the issue of punitive damages. In essence,

the court's remark was that, even if the jury should accept Greenberg's testimony, the most that the jury could find was that there was a breach of contract, but not a breach of fiduciary relationship (Tr. 113). Accordingly, there would be no basis upon which punitive damages could be allowed.

Counsel for Greenberg subsequently admitted that there was no contract between the parties (Tr. 251). In light of that admission the statement that the jury could infer the requirement of advance notice prior to change of the contract is without foundation.

Statement No. 11, page 11.

Greenberg is correct in stating that the "limits" of 100 "open" or any "limits" could be changed by Merrill Lynch without notice. As Greenberg's own expert testified, "limits" are simply credit guide lines established unilaterally by the broker for its own benefit in determining the amount of purchases and the extent of the risk that it might assume on margin for any given customer (Tr. 148-150). A broker does not obligate itself to accept new orders merely by notifying a prospective customer as to its thinking, i.e., "limits," on what the maximum size of its customer's account should be. Consequently, Merrill Lynch, in notifying Greenberg of any "limits" on his account with Merrill Lynch, never at any time "agreed" to place for Greenberg any orders for sugar futures contracts.

6. Greenberg presented no evidence of compensable damages.

In passing on Merrill Lynch's motion, the court remarked that Merrill Lynch's "promise" was not breached because it could be terminated and had to be terminated within the custom of the trade, and that there was no evidence that the termination was in any other way. The court granted the motion on that ground, and on the additional ground that "the damages which were attempted to be proved in this case were entirely speculative, attempting to place orders which Mr. Greenberg knew would not be accepted and executed." (Tr. 270)

In his argument concerning the damage issue, Greenberg again attempts to assert that the court should have made factual findings; that the court's remarks can be taken as a determination of factual issues; and that it was error for the court to make such findings. (Appellant's Brief, page 12) As on the question of breach of agreement, however, it is apparent that the trial court did not make a "finding" concerning a disputed fact issue, but simply ruled that there was no evidence over which reasonable men could differ which supported a claim for damages.

a. Greenberg's claim for damages was purely speculative.

In the course of pretrial proceedings, Merrill Lynch urged the court to consider whether the claim for damages as

asserted by Greenberg was the proper measure of damages. (R. 474-478) That question was thoroughly briefed in pretrial memorandums (R. 419-429, 459-480) and ruling thereon was reserved (R. 481). At the end of Greenberg's evidence, Greenberg suggested to the court the application of "value of a chance" theory which had been presented by Merrill Lynch (Tr. 252, 262). Greenberg's present counsel now seeks to assert that competent evidence of damages was in fact presented in accordance with the proper measure of damage rule.

Merrill Lynch submits that no competent evidence of damages was submitted under the proper measure of damage rule.

It is the general rule, both in Oregon and elsewhere, that loss of prospective profits which are remote and speculative cannot be recovered as damages for breach of a contract.

Weaver v. Austin (1948)
184 Or 586, 601, 200 P2d 593

Western Rebuilders, Inc., v.
Felmley (1964) 237 Or 191,
203, 386 P2d 813, 391 P2d 383

Greenberg's claim was solely for the loss of prospective profits he claims he would have made if Merrill Lynch had not refused to place orders for the purchase or sale of contracts not already held in his account. (Ex. 75) Greenberg does not claim that he was forced to liquidate contracts already held at a loss, or that he suffered any loss on his transactions in the actual commodity.

Further, there was no claim of actual monetary injury, even as to orders Greenberg claims he was prevented from placing. Greenberg contended that the paper book value of the contracts would have increased as of a certain date, and that his damages were measured by the difference between what the contracts would have cost if purchased and their paper value on the later date (R. 427). The fallacy in that argument, as Greenberg's trial counsel apparently ultimately recognized, is that there can be no profit until a sale is made, and Greenberg did not claim he would have sold the contracts on the date in question. If he had not made a sale, of course, the paper profit would never have been realized, and, if not realized by a sale, would have disappeared immediately as the market began to swing the other way. (Ex. 180) The fact is, as the district court noted, that Greenberg arbitrarily selected the one day on which the contracts showed a paper appreciation as the date to "value" the contracts. (Tr. 270)

For the same reason, any argument that Greenberg suffered monetary damage because he would have been entitled to withdraw money from his account on the day in question is without merit. A customer is entitled to withdraw money from his account when it becomes "overmargined" by appreciation of the value of the contracts. He is also required, however, to put up additional money when his account is "undermargined." Because the market fluctuates constantly, it would be impossible to determine whether a profit or loss had ultimately been made on the transaction until the contract

had been disposed of and it had been determined whether withdrawals exceeded amounts required to maintain margin. Thus, until a transaction has been closed out, the question whether it would have been profitable is necessarily based on speculation.

Finally, and most importantly, there was no evidence that Greenberg would have suffered any loss if he had later actually replaced his orders for the same contracts with his new broker, because there was no evidence that the contracts were not available at the same prices at a later date. In fact, Greenberg could have purchased the same contracts through his new broker at a more favorable price. (Ex. 180)

The authorities cited by Greenberg in his attempt to justify his theory of damages do not support a claim for damages under the circumstances present here. They fall within the following categories:

1. Where the specific order was accepted by the broker but negligently carried out.
2. Where the broker converted stocks or commodities presently held by its customer by selling without the customer's approval.

The class of cases involving conversion is entirely irrelevant. There was no claim for conversion made by Greenberg; he was not forced to sell contracts held in his accounts; and he had adequate time to sell such contracts on the dates he chose. (Tr. 198)

The cases cited by Greenberg in the first category are also only remotely in point. There is a clear distinction between a case in which an order is given to purchase or sell commodities contracts not presently held in the customer's accounts, and an order to sell commodities contracts which are presently held in the customer's account.

Meyer, Stockbrokers and Stock
Exchanges, Section 134,
page 545

Merrill Lynch urges that, in the case of an order contemplating an originating transaction, damages should not be recoverable unless the customer actually had the order executed elsewhere. Unless the order has been executed elsewhere, damages are purely speculative.

Gurley v. MacLennan
(DC, 1900) 17 App Cases 170

Greenberg does not even apply the rule laid down by his own authorities, but instead asserts a new measure of damages not recognized by any authority; i.e., the difference between the order price and the market price as of a date arbitrarily selected by Greenberg to "value" the contract. Such a theory of damages is without rational justification as it is impossible to determine whether Greenberg in fact would have made a profit or suffered a loss.

b. If Greenberg had suffered any damages, they could only have been measured by the "value of the chance" to make a profit at the time of the alleged breach of contract.

Properly analyzed, Greenberg's claim is simply that he was deprived of a chance to make short-swing profits on new orders because Merrill Lynch refused to handle new business for him on margin.

In essence, this claim is equivalent to the contention that Merrill Lynch breached its agreement to loan up to a certain amount of money to purchase sugar futures contracts. In accordance with the rule prohibiting speculative damages, a claim for loss of profits for breach of such agreement is not allowable as a matter of law.

Farabee-Treadwell Co. v. Union
Planters' Bank & Co. (Tenn,
1916) 186 SW 92

As we have pointed out, Greenberg did not claim that Merrill Lynch accepted orders and negligently failed to carry them out. The contract "right" which Greenberg claims was breached was the right allegedly acquired in the "agreement" or "promise" of March, 1965, to be able to place future orders and acquire not in excess of 300 "open" sugar futures contracts. However, an agreement to accept future orders, such as was relied on by Greenberg in this case, is not the equivalent of an agreement to accept a specific order to buy or sell a stated quantity of stocks or commodities at a given price, particularly insofar as the element of certainty of loss of profits is concerned.

Where a specific order has been accepted by a broker, the right breached upon failure to execute the order is the right to receive a stipulated quantity of stocks or commodities

contracts at a given price. On the other hand, notification of an intent to refuse future orders may, in a proper case, violate the offeree's right to enter into future transactions. As the terms of price and quantity are necessarily not known by either party at the time of such breach, the element of certainty is entirely missing. Whether any such future transaction, if made, would be profitable or unprofitable is a matter of chance which cannot be determined except through hindsight. It was undoubtedly for this reason that the district court remarked that Greenberg's orders were hypothetical. The alleged breach had already occurred, and Greenberg, knowing such orders would not be accepted, then attempted to place orders.

In cases like this where the realization of profits is contingent upon an uncertain event, the courts have developed an alternative measure of damages. This measure of damages has been referred to as the "value of a chance." See

5 Corbin on Contracts,
Section 1030

Compare

Western Union Tel. Co. v.
Crall (Kan, 1888) 18 Pac 309

with

Wicks v. Knorr (Conn, 1931)
155 A 816

Wachtel v. National Alfalfa
Journal Co. (Iowa, 1920)
176 NW 801

This is the measure of damages which Greenberg at trial suggested might be applicable. However, even under this theory, Greenberg did not, as a matter of law, suffer any damage, nor more importantly, did he present any proof in support of such theory.

The value of Greenberg's "right to compete" (i.e., right to speculate on the rise or fall of the commodity market) was entirely speculative and, therefore, no damages could be recovered in this case. At the time Merrill Lynch gave Greenberg notice that it would accept liquidating orders only (the time of the alleged breach), Greenberg had no orders pending with Merrill Lynch. As there would have been no way of knowing at that time what orders Greenberg might place, the "value of the chance" given by Greenberg's alleged contract right is nothing, because the probability of a gain is so remote that the necessary certainty to measure such a gain is entirely lacking. In light of the admitted facts in this case, the district court properly directed a verdict for Merrill Lynch on the additional ground that there was no evidence of damages.

POINT II

THE TRIAL COURT PROPERLY REMOVED THE ISSUE OF PUNITIVE DAMAGES FROM THE JURY.

Greenberg assigns as a second major ground of error the district court's ruling removing the issue of punitive damages from the jury's consideration.

The claim that the court erred at the end of the first day of trial in withdrawing the issue of punitive damages from the case appears to be just extra frosting on the cake, as the district court's action, even if erroneous, would not provide a basis for reversal. If Greenberg failed to prove his claim for general damages, he may not recover exemplary damages, because there can be no cause of action for exemplary damages alone. Not only must Greenberg establish his claims, but proof of actual damages is a prerequisite, and the jury could not have awarded exemplary damages unless it first found some basis for and actually made an award of general damages.

Weaver v. Austin (1948)
184 Or 586, 200 P2d 593

Martin v. Cambas (1930)
134 Or 257, 293 Pac 601

Thus, if the trial court's ruling that there was no breach of contract and no damages is correct, the issue of punitive damages is out of the case automatically and need not be considered on appeal.

A. Exemplary damages may not be awarded for breach of contract.

Aside from the fact that Greenberg's second assignment of error does not constitute a ground for reversal, the district court's ruling was clearly proper as a matter of law. Punitive damages may not be awarded for breach of contract under Oregon law.

Weaver v. Austin (1948)
184 Or 586, 200 P2d 593

Smith v. Abel et al (1957)
211 Or 571, 316 P2d 793

There was no evidence presented, or to be presented, in this case of malicious conduct attending the alleged breach of contract which could provide a basis for an award of exemplary damages. (Tr. 107-113) Even taking the arguments asserted in Greenberg's brief at their best (and the exhibits relied upon are not in evidence) this was not the type of case where exemplary damages could be awarded.

5 Corbin on Contracts, Section 1077, 437, 440

Corbin points out that in those few jurisdictions where the courts have allowed the jury to consider the issue of exemplary damages in connection with a claim for breach of contract, there were elements which enabled the court to regard them as falling within the field of tort. Some of the cases have involved actions against public service companies (where there is an extra duty of care imposed by law, independently of contract); some have involved a breach of promise of marriage (usually accompanied by seduction). A third class of cases where the damages have sometimes been described as punitive are cases where depositors have sued their bankers for failure to honor checks or drafts. In these cases, the jury is allowed to award exemplary damages for intentional injury to the depositor's credit.

Greenberg has cited certain cases in support of the proposition that exemplary damages are recoverable for breach of contract. However, these cases actually support Merrill

Lynch's contention that punitive damages are recoverable only where the wrong arises primarily out of some intentional tort. For example, in

Harper v. Interstate Brewery Co. (1942)
168 Or 26, 120 P2d 757

defendants at the close of the evidence moved to require plaintiffs to elect whether they were proceeding in contract or in tort. Plaintiffs elected to proceed in tort.

The significance of the fact that the Harper case was in tort has been noted in an article on the doctrine of punitive damages.

Hodel, The Doctrine of Exemplary Damages in
Oregon, 44 Or L Rev 175, 198-199 (April, 1966)

"The defendants argued with great vigor that the plaintiff's cause of action was in contract. The Oregon court held that this was a tort action and upheld an award of compensatory and exemplary damages. The fact that the court found it necessary to consider at length the question whether this was an action in tort or contract before allowing exemplary damages, lends support to the view that such damages were considered available only in tort actions."

The well-known case of

Brown v. Coates (DC Cir 1957) 253 F2d 36, 39

also supports Merrill Lynch's contention that exemplary damages may be awarded only in cases in tort where the contract is merely incidental to the acts complained of. In the Brown case, plaintiffs were induced to enter into an exchange agreement with defendant broker, under which the broker was to convey a new house to plaintiffs (subject to encumbrances), and plaintiffs were to convey their old house to defendant broker

(subject to certain encumbrances). The literal effect of the contract was that plaintiffs were to convey a house worth \$13,000 to \$15,000, in which they had an equity of \$9,000, and receive a house worth \$14,000 to \$17,000, in which they would have no equity, but would be required to pay \$14,500.

When defendant sold plaintiffs' old house, he refused to credit any part of the proceeds to plaintiffs. Plaintiffs then brought an action, claiming that, notwithstanding the written agreement, the actual agreement between the parties was that defendant would sell the old house, deduct an agreed commission, and apply the net proceeds of the sale to reduction of the debt on the new house. It is clear from the facts of the Brown case that the contract there in question was only the instrument by which the broker carried out his fraudulent scheme, and that the case did not involve the breach of an ordinary commercial agreement.

The Oregon court, in a case somewhat similar to the Brown case, has ruled that exemplary damages were properly eliminated by the trial court.

Ridgeway v. McGwire (1945)
176 Or 428, 441, 158 P2d 893

Oregon law is, of course, controlling on the substantive issue whether exemplary damages may be allowed in this case.

B. No fiduciary relationship existed between Greenberg and Merrill Lynch.

As stated above, exemplary damages may not be allowed for breach of contract. Greenberg contends, however, that there

was some fiduciary relationship over and above the contract, the breach of which should entitle Greenberg to recover exemplary damages.

Greenberg does not explain how a fiduciary relationship arose in this case. The parties clearly were dealing at arm's length. There was no claim that Merrill Lynch had superior knowledge, that it had any position of advantage, or that, because of the nature of the business, there were additional duties imposed by law (as would be the case with a public carrier). Greenberg does not even explain what kind of fiduciary duty was breached, but simply claims that Merrill Lynch refused to have further business dealings with him.

Aside from the fact that there was no peculiar relationship of trust and confidence, it is not possible to imply such relationship from the fact Merrill Lynch had previously accepted and executed orders for Greenberg. See Walston & Co. v. Miller (Ariz 1966) 410 P2d 658.

In the Walston case, the broker brought an action for the balance owing when defendant Miller's commodity account was closed out. Miller counterclaimed, alleging that Walston owed Miller a duty to timely notify Miller of certain information which might affect prices on the world sugar market. Miller contended that Walston's failure caused him to lose money deposited with Walston and, in addition, to lose certain profits.

In reversing an award of damages for Miller, the court held that, at the time of the acts complained of, there was no "fiduciary relationship" between the parties.

Greenberg's argument that a commodity broker's duties do not terminate upon execution of an order to buy or sell, but continue for a long time thereafter while it carries out contracts entered into in its own name with the exchange, is patently designed to explain away the Walston case, although Greenberg carefully avoids mentioning the Walston case by name. This argument fails, however, for the same reason the argument that the broker-customer relationship is not terminable at will failed. The authorities in both areas, without exception, clearly state the rule to be that the broker-customer relationship is terminable at will upon immediate notice, while only the secondary relationship of pledgor-pledgee requires substantial advance notice. The court in Walston, as in the instant case, was not concerned with the secondary relationship of pledgor-pledgee which arises both where the broker carries stocks on margin for his customers, and where he carries commodities contracts on margin for his customers, but with the first relationship, which terminates upon completion of each order.

The distinction between the right of the broker to terminate the relationship, even while he is carrying a margin account for his customer, see

Robinson v. Ungerleider (Pa 1933)
169 A 886,

and the right to terminate the secondary relationship of pledgor-pledgee by a forced sale goes to the very heart of the issues here, because Greenberg does not claim to have suffered any damages as a result of breach of the secondary relationship.

C. There is no evidence in this case of malice or of aggravating circumstances.

As pointed out above, Greenberg has been, and was when asked by the trial court, unable to point to any breach of duty or to any evidence of intent to cause harm, other than the alleged breach of contract in refusing to enter into future business transactions. Merrill Lynch does not, of course, accept Greenberg's statement that the mere existence of a fiduciary relationship (if in fact such relationship existed) coupled with a simple breach of contract, is sufficient to justify an award of punitive damages. The fiduciary's breach must be tortious and committed with an intentional disregard of the rights of the other party. In short, there must be some evidence of fraud, overreaching, secret profit-taking or the like. There was none.

The 14 contentions made by Greenberg on pages 19 and 20 of his brief make no mention of any deliberately wrongful act. At best, contentions 1 through 5 constitute a claim that Greenberg and Merrill Lynch had normal business dealings over a period of time.

Contentions 6 through 8 mention the fact that Greenberg was dealing with actual sugars. However, Greenberg claimed no damages whatever on account of losses caused by dealings in the actual sugar market. If Greenberg had suffered any such damages, there can be no doubt but that a claim of this nature would have been asserted.

Contention 13 is also irrelevant, because Greenberg claimed no damages from being unable to "protect himself." His claim was simply that he would have made a profit on new transactions, had he been allowed to buy and sell new contracts.

Contentions 9 through 12 presumably are intended as support for the claim that Merrill Lynch recognized that it had some duty to Greenberg, but acted in deliberate disregard of that duty. Contentions 11 and 12 are misrepresentations of the actual testimony (see discussion, pages 30 and 31 herein). The statement in contention 10 is not evidence at all, but simply Greenberg's hearsay testimony of other hearsay.

Greenberg's contention 9 is also erroneous. Exhibits 14 and 15 show that the decision to limit Greenberg to liquidating orders only was not made until October 21, 1965. Greenberg admitted that a representative of Merrill Lynch's Portland office had tried to contact him on that date, but he had not returned the telephone call. (R. 57) The actual wire informing the Portland office of the commodity department's final decision was not sent until October 22, 1965. (R. 57)

Greenberg's contention 14, based upon exhibits that were never admitted into evidence, is without basis in fact or logic. Greenberg does not explain what the significance of the proposed exhibits is, except as to Exhibit 190. His explanation of Exhibit 190, however, borders on the fantastic. Greenberg claims that Merrill Lynch limited his account to liquidating orders because it was in an exposed position in

the market, compared with its normal activities. There is no indication what Merrill Lynch's "normal activities" in the market are. Even if Merrill Lynch had been in an exposed position in the market, however, the action taken would not reduce its exposure. In order to reduce its position, Merrill Lynch would have had to force a sale of the contracts then in Greenberg's account. In fact, this did not occur, and Greenberg continued to hold the contracts in his account until they were gradually reduced months later and the balance transferred to his new broker. (Tr. 198) Limiting Greenberg to liquidating orders would not reduce Merrill Lynch's exposed position, but would only continue the status quo.

In conclusion, the trial court properly concluded that neither the type case, nor the evidence presented, justified the submission of an issue of punitive damages to the jury.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING GREENBERG'S MOTION TO AMEND HIS PLEADINGS TO ADD A CAUSE OF ACTION BASED ON AN ALLEGED VIOLATION OF THE ROBINSON-PATMAN ACT.

In August, 1967, 19 months after this case had been filed, and little more than a month before the date set for trial, Greenberg moved to amend his complaint to assert alleged violations of the Robinson-Patman Act (15 USC 13(c)). (R. 450) At the same time, Greenberg filed numerous and complex interrogatories directed at such issues. (R. 437-449)

The trial court, after considering several briefs, denied Greenberg's motion.

Greenberg asserts that the trial court's refusal to allow the motion to amend constitutes reversible error.

A. The trial court did not abuse its discretion in denying Greenberg's motion to amend.

As the grant or denial of an opportunity to amend is within the discretion of the district court under Rule 15a of the Federal Rules of Civil Procedure, the court's action cannot be reversed unless the court abused its discretion.

There is justification for allowing amendment where the amendment seeks only to cure an imperfectly stated cause of action. In the cases cited by Greenberg, the proposed amendment merely stated an alternative theory based on the same operative facts, or added some fact necessary to state a complete cause of action. In most of the cases, the complaint had been dismissed for failure to state a claim on which relief could be granted, and the plaintiff would be out of court if the amendment were not allowed. The district court's refusal to allow an amendment to cure an imperfectly stated claim where a genuine claim exists may legitimately be considered an abuse of discretion, because the plaintiff is left without remedy.

It is not an abuse of discretion to deny a motion to amend, however, where there is a justifiable reason for the denial and the claim is independent of the original cause of

action and will not be barred if the motion to amend is not allowed. In the instant case, Greenberg's new claim involved an entirely new set of operative facts and a new theory of law. No discovery had been had on the claim (although Greenberg proposed to institute such proceedings), and the motion to amend was filed 19 months after the case had been instituted and within one month of the date set for trial. The new claim was clearly of the sort which could be asserted in an independent action and would not be barred by the trial court's refusal to allow amendment. Under the circumstances, the motion to add a new claim was properly denied. See:

Suehle v. Markem Machine Company
(ED Pa, 1965) 38 FRD 69

Portsmouth Baseball Corporation
v. Frick (SD NY, 1958) 21 FRD 318

As a side issue, Greenberg also contends that the amendment should have been allowed because Merrill Lynch had resisted discovery proceedings so extraordinarily that the new issue could not have been raised sooner. Greenberg cites a much abbreviated schedule of docket entries in support of his contention.

The record discloses no improper action on Merrill Lynch's part in opposing certain of Greenberg's discovery tactics.

The facts are that Merrill Lynch promptly made available to Greenberg and his counsel all documents and records in its Portland, Oregon, office. In May, 1966,

Greenberg's counsel took testimony by abbreviated depositions of certain of Merrill Lynch's officers in New York City, at which time documents in its New York office were produced for inspection. A year later Greenberg's counsel took intensive testimony by deposition of Merrill Lynch representatives in New York City.

At no time in the course of the discovery proceedings did Greenberg inform the trial court that he was seeking information in support of a new claim for breach of the antitrust law.

Further, what Greenberg does not disclose is that Greenberg propounded an additional set of complex and lengthy interrogatories on August 4, 1967, when he moved to amend his complaint to include the antitrust claim. (R. 437-449) This set of interrogatories was relevant only to the antitrust issues which Greenberg sought to introduce. (Pretrial Conf. Tr. 27) The trial court, in ruling on Greenberg's motion to amend complaint, undoubtedly had in mind that Greenberg just prior to trial was initiating discovery on an entirely new issue, and that, because it purportedly involved matters which took place solely in England, discovery would be a time-consuming process.

It also should be noted that some of the delay in discovery proceedings on both sides was occasioned when Greenberg's first set of counsel withdrew and Greenberg obtained new counsel. (R. 367) Answers to Merrill Lynch's interrogatories were delayed on this ground for three months. (R. 315, 368)

In conclusion, there is no basis for any contention that Merrill Lynch acted without justification in opposing certain of Greenberg's discovery requests. Merrill Lynch had a legitimate concern for, and the right and obligation to protect, the privacy of its customers' records. The fact that it did so should provide no comfort for Greenberg in his argument that the trial court improperly denied his motion to amend his complaint.

CONCLUSION

Merrill Lynch respectfully submits:

1. The trial court did not err in dismissing Greenberg's cause of action for damages arising out of Merrill Lynch's declination to Greenberg to place further orders for new sugar futures contracts.

2. The trial court did not err in removing the issue of punitive damages from the case.

3. The trial court did not abuse its discretion in denying Greenberg's motion to amend his pleadings to add a new cause of action alleging a violation of the Robinson-Patman Act.

The judgment of the trial court should be affirmed.

Respectfully submitted,

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APPENDIX A

Definition of Terms

To aid the court in understanding the nature of the claims and defenses that were asserted by the parties in this case, the following explanation of terms is submitted. This explanation paraphrases in part the statement in

Volkart Brothers, Inc., v. Freeman (5th Cir, 1962) 311 F2d 52

1. Position. A person engaged in the production or importation of sugar or in the manufacture of products containing sugar may deem it necessary to contract to purchase or sell sugar for future delivery through the commodities exchange. Contracts on the exchange call for the purchase or sale of a stipulated amount of sugar for delivery during a specified month 1 to 15 months from the date the contract is made. A person who buys or sells a sugar future contract takes a "position" on the exchange.

2. Hedge. One of the primary reasons for taking a "position" on the exchange is to offset commitments in the actual commodity, and thus insure or "hedge" against price fluctuations. For example, a merchant who contracts to sell sugar to a mill to be delivered in six months may not yet have the actual commodity. Accordingly, in entering into a contract with a mill, the merchant takes the risk of a change in price by the time he must acquire sugar to fulfill his commitment to the mill. To guard against a change in price, the merchant takes a "long" position on the sugar futures exchange by making

a contract to purchase for future delivery. If the price of actual sugar increases during the period, the price of sugar on the futures market will tend to increase correspondingly and the loss the merchant sustains by having to pay a higher price for actual sugar will be offset by his gain on the futures market when he closes out his futures contract at a profit. Such a transaction is defined as a hedge against actuals.

A hedge against actuals may also involve a "short" position on the futures market. A person taking a "short" position contracts to sell sugar for future delivery on the exchange to offset the risk of a decline in value of his existing inventory of the physical commodity.

Commodities contracts on the exchange may also be offset or "straddled" against each other. Speaking generally, if a person is long 100 contracts on the exchange and short 50 contracts, his "position" on the exchange is commonly referred to in the trade as 50 contracts straddled and 50 contracts net long or "open" (i.e., 50 long contracts for which there are no offsetting short contracts).

3. Speculator. In addition to producers, dealers, or manufacturers who use commodity exchanges to insure against the risk of price fluctuations in the actual commodity, the exchange is used by persons who buy or sell sugar futures contracts with the expectation of buying or selling the contract at a gain before the delivery month. Such persons are generally not dealing in the actual commodity, but use the exchange in

the expectation of making a cash profit from price fluctuations. Because the speculator generally does not put up the full amount of the contract when he takes a position, but deposits only a small percentage of the contract price with his broker, there is a certain leverage factor, and it is possible to make sizable profits or incur sizable losses in a short period of time.

4. Operation of the market. For every person who contracts to purchase sugar on a futures exchange, there must necessarily be a corresponding person who contracts to sell.

Contracts on the exchange are not made directly by the parties in interest, but by members of the exchange who enter into contracts on behalf of their customers with other members also acting for their customers.

A contract on a futures exchange may be disposed of either by offset, or by delivery and receipt of warehouse receipts for the physical commodity. Disposition of contracts by offset may be accomplished where a person having a long position enters into a contract to sell. His purchase and sale contracts then offset each other and are transferred off by his broker. Likewise, a person having a short position may enter into a contract to purchase, and his sale and purchase contracts offset each other. Contracts not offset remain "open" and, if open on the last trading day, must be performed by delivery of the actual physical commodity by the person who is short, and the receipt and payment therefor by the person

who is long. (It should be noted that short contracts for different months than long contracts do not offset each other, and that it is thus possible to have both short and long contracts in an account--the type of position known as a "straddle.")

The liquidation of futures contracts on an exchange by offset instead of by delivery is generally to be expected because of the manner in which the exchange is utilized. The speculator does not deal in the actual commodity, but uses the exchange to make a cash profit from fluctuations in prices. The hedger, who deals in the commodity, also is generally interested in liquidating his futures contracts, because any loss he sustains on his commitments in the actual commodity is expected to be offset by profits on the futures market.

Despite the fact that most contracts on futures markets are liquidated by offset, the parties to the futures contract have the obligation to deliver or take delivery of the commodity unless the contract has been liquidated by offset on the exchange. As futures contracts made on the exchange are binding until fulfilled by delivery and payment, and contracts entered into with an understanding that they are not to be so fulfilled are forbidden by the rules of the New York Coffee and Sugar Exchange, the transactions on the exchange are considered legal contracts and not mere wagering agreements.

No. 22,560

FEB 2 1959

IN THE

**United States Court of Appeals
For the Ninth Circuit**

| | | |
|---|---|--|
| PSG Co., a corporation, and PHILIP S. GREENBERG, vs. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., | } | <i>Appellants,</i> <i>Appellee.</i> |
|---|---|--|

**Appeal from the United States District Court
for the District of Oregon
Honorable Robert C. Belloni, Judge**

APPELLANTS' REPLY BRIEF

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FILED

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No. 22,560

IN THE

**United States Court of Appeals
For the Ninth Circuit**

PSG Co., a corporation,
and PHILIP S. GREENBERG,
Appellants,
vs.

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.,
Appellee.

**Appeal from the United States District Court
for the District of Oregon**

Honorable Robert C. Belloni, Judge

APPELLANTS' REPLY BRIEF

Appellants PSG Company and Philip Greenberg submit herewith their reply to the various points made in the brief of appellee Merrill Lynch:

1. **Statement of Issues.** Under this heading Merrill Lynch's brief (pp. 1-2) recites its version of the issues raised by Greenberg's appeal.

ANSWER: Appellee's version of the issues differs considerably from the issues actually raised by appellants, as outlined plainly and simply in our open-

ing brief at p. 5, namely: the trial court erred in denying Greenberg (a) his right to a jury verdict on the merits of his case, (b) his right to introduce evidence on punitive damages, and (c) his right to introduce evidence of Merrill Lynch's violation of the Robinson-Patman Act. To the extent that appellee Merrill Lynch discusses its own version of the issues it misses the point of our appeal.

Appellee's brief here repeatedly states, in varying phraseology, without transcript reference, that the issues center about Greenberg's alleged right "to place orders for new sugar futures contracts" (p. 2). This is not so. There would have been no lawsuit had that been the issue. The true issue was, and is, Greenberg's right to protect his *old* business, that is, his "position" on the day in question, with some 587 futures contracts pending between the parties (appellee's brief, p. 10), worth between two and three million dollars (Pretrial Rep. Tr. p. 94). It was imperative to protect those pending contracts by subsequent buy and sell orders, depending upon subsequent market developments, as was admitted by Merrill Lynch itself (Rep. Tr. pp. 212-213, 61-62). See *Volkart v. Freeman*, 311 F. 2d 52, 55. ALL THE ORDERS REFUSED BY MERRILL LYNCH ON OCTOBER 22ND WERE ORDERS BY GREENBERG PROTECTING HIS "OLD" POSITION (Rep. Tr. pp. 100, 245). Involved here is *not* "new business"!

2. Statement of the Case. Under this heading (pp. 3-11) Merrill Lynch recites its statement of this case.

ANSWER: With enviable insouciance appellee dismisses our statement of the case as "inaccurate and incomplete", without enlightening us in any way as to alleged deficiencies; appellee then proceeds to give us its carefully culled selection of the "facts".

Unlike the usual appeal, however, we are not concerned on this appeal with the evidence that might support appellee and the judgment; we are concerned with the evidence contra the judgment, since the trial court took the case from the jury. *Lucero v. Donovan* (9th Cir.) 354 F. 2d 16. The evidence favoring Greenberg is recited in our opening brief, with each item carefully cited to the record. The failure of appellee to attack the same is a reasonably clear admission of its validity. It is the evidence ignored by appellee which is significant and compels a reversal, *not* the evidence recited by appellee.

3. Obligation to take orders. Merrill Lynch contends (p. 3) it was not "obligated in any way to continue to place orders to purchase or sell sugar future contracts for Greenberg."

ANSWER: This statement does correctly describe the real issue here. Merrill Lynch contends it was under no obligation to take orders of any kind, though at the time there were some 587 contracts pending between the parties, compelling the actual delivery of tens of thousands of tons of sugar in the future, had no further orders been executed. To state the

contention is to demonstrate its error. At least at the time in question Merrill Lynch purported to permit liquidating orders, though the facts showed that even liquidating orders were refused (Rep. Tr. pp. 60-61, 194, 197, 200) and pending unexecuted orders were cancelled by Merrill Lynch (Cl. Tr. p. 57, l. 15).

4. Robinson-Patman Claims. Merrill Lynch states (p. 4) that Greenberg in the pretrial order did not make any contention against Merrill Lynch under the Robinson-Patman Act.

ANSWER: This claim was not in the pretrial order because the court refused to include it in the pretrial order (Cl. Tr. p. 72), though application therefor was made considerably before pretrial (Cl. Tr. p. 424 et seq.). This is the very error raised by this appeal.

5. Time to liquidate. Merrill Lynch states (p. 4) that "Greenberg's testimony was that a reasonable time to liquidate had been given (Tr. 269)."

ANSWER: The transcript reference is to a comment of the court; Greenberg's position is somewhat to the contrary.

6. Declination of orders by broker. Appellee states (p. 5) that Greenberg's expert testified that a broker can decline to accept employment at any time.

ANSWER: This statement is an example of the fundamental error running throughout appellee's brief, namely, the citing of evidence favorable to it and ignoring unfavorable evidence. The pertinent facts are that Greenberg's expert testified (Rep. Tr.

pp. 131-132) that it is the custom of the trade to give reasonable advance notice to the customer of any change in policy. Also of considerable import is Merrill Lynch's own admission that it *could not* have done what it did if Greenberg had not been notified beforehand (Rep. Tr. p. 214).

7. Grounds of the decision. Merrill Lynch states (p. 5) without one single citation to the record, a number of "conclusions" of the court concerning factual issues in this case.

ANSWER: As noted in our opening brief, no findings of fact or conclusions of law were made by the court in this case, so that Merrill Lynch, in purporting to recite the court's conclusions, presumes much. For example, Merrill Lynch would have us believe (p. 5) that the court held that "the evidence of damages based on loss of future profits was purely speculative"; yet the court itself stated it "couldn't even get to the point of damages" (Rep. Tr. p. 271).

8. Promissory estoppel. Merrill Lynch concedes (p. 5) that the court found that Merrill Lynch could be bound, under promissory estoppel, by its promise to take Greenberg's business up to 300 contracts open, but that this promise "could be terminated in accordance with the custom of the trade, and there was no evidence that they were terminated in any other way."

ANSWER: Again, appellee ignores unfavorable evidence that termination here was directly contrary to the custom of the trade. See Rep. Tr. pp. 92, 95, 131-132, 191, 214.

9. **Merrill Lynch's income.** Merrill Lynch states (p. 6) that its income is derived *solely* from commissions, citing R. 50.

ANSWER: The cited reference is to one of the agreed facts in the pretrial order, that "Merrill Lynch derives income from its commodity operation from commissions." Appellee gratuitously supplies the word "only". In the trial court Greenberg offered to prove that Merrill Lynch, through its chain of foreign subsidiaries, derives income from its commodity operations *as a principal*, and, through that device, it was taking the other side of Greenberg's orders in violation of the Robinson-Patman Act. See this point at our opening brief, p. 24; this is *not* answered in appellee's brief.

10. **Exclusive brokerage.** Appellee states (p. 7) that Greenberg never told Merrill Lynch that he would not trade with any other broker.

ANSWER: Greenberg testified as follows: "I told them I would be their customer, they would have all my business and they would be aware of it" (Rep. Tr. p. 187).

11. **"Paper profits".** Merrill Lynch states (p. 10) that the "paper book value" of the refused orders would have appreciated by \$45,821.00 during the time in question.

ANSWER: The evidence was that this sum was the actual cash Greenberg was entitled to demand from Merrill Lynch (Rep. Tr. pp. 11-15).

Merrill Lynch seems to suggest that the customer's sole function is to *pay* the broker (commissions and margins), never to *receive* money from the broker until the specific contract has been closed out. The fact, however, is that, each day, the customer if he wishes will receive payment from the broker of his equity (difference between value of all his contracts on that day and his margin requirements). See Rep. Tr. pp. 11-15.

12. **"Magic words"**. Merrill Lynch states (p. 13) that Greenberg's argument here is simply that judgment must be reversed because Merrill Lynch did not use the "magic words" of "motion for directed verdict" instead of "motion for dismissal".

ANSWER: Merrill Lynch seems to have attached some significance to the "magic words" in reciting, in the form of judgment it submitted to the trial court, that a "motion for directed verdict" had been made (Cl. Tr. p. 87), when, in fact, no such motion had been made. Be that as it may, our argument does not depend on any "magic words". Our argument, simply, is that a motion to dismiss has not been available in jury cases since the 1963 amendment to Rule 41 (b) F.R.C.P.

Appellee argues that the two motions are interchangeable citing *Wolf v. Reynolds*, 304 F. 2d 646 and *Carroll v. Seaboard*, 371 F. 2d 903. The first case was decided before 1963; in the second case the court without discussion, treated a motion to dismiss as a motion for directed verdict, citing as its authority Notes of Advisory Committee on Rules under Rule

41 (b) 28 U.S.C. The cited note reads in part, as follows:

“Accordingly, the second and third sentences of Rule 41 (b) are amended to provide that the motion for dismissal at the close of plaintiff’s evidence shall apply *only to non-jury cases*.” (Emphasis added).

The importance of the point goes far beyond technicalities. As we have seen, appellee’s brief is filled with flat statements of what the trial court supposedly “determined” or “found” or “concluded” as to the facts. Appellee repeatedly gives us, in supposed support of the judgment, its interpretation of the trial court’s “thinking” or “reasons”, citing, sometimes correctly, remarks of the trial court concerning *factual issues*. Treated as a motion for dismissal (which it was), the judgment falls for lack of findings; treated as a motion for directed verdict (which it was not) the judgment falls because the trial court in a jury case cannot dispose of factual issues raised by the evidence. That evidence was detailed in our opening brief and is largely ignored in appellee’s brief, as noted above.

13. **“Scintilla” rule.** Merrill Lynch vigorously attacks (p. 15 et seq.) the notion that a case must go to the jury if there is a “scintilla” of evidence to support a verdict.

ANSWER: We made no such contention.

14. **“Terminable at will”.** Merrill Lynch, without citing to the record, states (p. 16) that “the district court correctly determined that under familiar principles of agency law the relationship between Greenberg and Merrill Lynch was terminable at will.”

ANSWER: Again, this is Merrill Lynch’s interpretation of what the trial court “determined” on this important factual issue. The trial court said, at Rep. Tr. p. 269:

“Looking to the customs of the trade, it doesn’t seem to help us very much. We learned that when the limits are reduced, a reasonable amount of time is given to liquidate; and indeed such reasonable time was given in this case.”

We have heretofore detailed the evidence to the contrary.

15. **Pending transactions.** Merrill Lynch cites (pp. 16, 17) Meyer, *Stockbrokers and Stock Exchanges*, pp. 263, 264, for the rule that no notice is necessary “if there are no transactions pending between the broker and the customer at the time.”

ANSWER: Here, there were 587 transactions pending between the broker and the customer at the time. (Appellee’s brief, p. 10). Secondly, *pending unexecuted orders were cancelled by Merrill Lynch* (Cl. Tr. p. 57, l. 15; Ex. 72 October 22, 1965).

16. **Obligations of stock broker.** Merrill Lynch cites (pp. 18, 19) authorities for the rule that a *stock broker* is not required to accept new business.

ANSWER: The inapplicability of these citations is clear: a *stock* transaction is completed and closed

upon execution of the order to buy or sell; in a commodity transaction the heavy obligation of the broker to his customer, to the Exchange, to the other party to the contract, may run on a year or more thereafter, as we pointed out in our opening brief (pp. 16-17), without reply by appellee. See Exchange Rules, Ex. 59, 149 and see *Volkart v. Freeman*, 311 F. 2d 52, 55, 56. Involved here are *futures* transactions which are simply *started* by the order to buy or sell. Thus, authorities for the rule that a *stock* broker's responsibilities end with execution of the order are inappropriate.

17. **"Reasonable liquidation"**. Merrill Lynch states (p. 20), without citation to the record, that "Greenberg testified that Merrill Lynch had not forced him to liquidate and had given him a reasonable time to reduce his accounts and transfer his contracts to his new broker."

ANSWER: It is apparent why appellee does not cite this statement to the record, for no citation could be given.

18. **Evidence of agreement.** Merrill Lynch states (p. 21 et seq.) that Greenberg expressly conceded there was no evidence of an agreement obligating Merrill Lynch to accept his orders, citing TR 251.

ANSWER: The transcript reference does not support appellee's statement. At the cited reference Greenberg's counsel stated he was not contending, "that there may have been some quid pro quo offered by way of a bilateral promise". This is a long way from saying there was no agreement!

Merrill Lynch seems to argue that there must be some *separate* payment or other consideration paid for any promise of a future act before that promise is binding. It argues that when Greenberg's counsel freely admitted there was no such *separate* consideration paid for Merrill Lynch's promise, Merrill Lynch was free to claim its promise was only "pretend" and unenforceable. One wonders if Merrill Lynch's thinking along these lines should not be more fully advertised to its customers—beforehand.

The contention is analogous to arguing that the automobile manufacturer's promise of future service to the customer under its warranty is unenforceable unless the customer can show a separate payment for that warranty. To state the argument is to demonstrate its fallacy.

Merrill Lynch concedes (p. 22), even under its theory, that "consideration" may be found where one of the parties has agreed to place his orders exclusively with the other. Here Merrill Lynch was Greenberg's sole and exclusive broker, as Merrill Lynch well knew (Rep. Tr. pp. 23-24); Greenberg *could not* take his business elsewhere for a ten day period (Rep. Tr. pp. 135-136), so that, for that period of time, Greenberg was exclusively committed to Merrill Lynch. Thus, even under Merrill Lynch's theory, "consideration" may be found.

19. **Agreed limits of 300.** Merrill Lynch charges (p. 23) us with a "particularly glaring misstatement" in stating that the parties had agreed in the trial court that Merrill Lynch had at one time agreed to accept orders up to a maximum of 300 contracts open, citing the pretrial order.

ANSWER: Appellee scores a point in noting that our reference supporting the statement was, inadvertently, to Greenberg's contentions in the pretrial order rather than to the agreed facts in the order. We are somewhat nonplussed, however, at Merrill Lynch's suggestion that the statement itself is not true. Counsel for Merrill Lynch told the jury in his opening statement, at p. 45 et seq.:

"In March of '65, Mr. Greenberg's plans were becoming somewhat concrete, and he said, 'I think that the limits I want should amply be taken care of if you let me take up to 300 contracts open for this purpose that is going to occur very shortly.' And Merrill Lynch, feeling that the risk was not so great, as long as he put up the money for those actual sugars, they said, 'That's fine. Go ahead. We will take care of you.'"

20. **The issue of promissory estoppel.** Merrill Lynch contends (p. 24) that the issue of promissory estoppel is not properly in the case since it is not in the pleadings or pretrial order.

ANSWER: The trial court has already rejected this contention (Rep. Tr. p. 127).

21. **Expert testimony.** Merrill Lynch contends (p. 26) that Greenberg's expert witness offered no testimony of a trade custom to support Greenberg's theory and that the expert had himself terminated a customer without notice.

ANSWER: Again Merrill Lynch chooses evidence it likes and ignores the rest. In our opening brief (pp. 8-9) we detailed the testimony of the expert in support of Greenberg's theory (Rep. Tr. pp. 129-132, 136, 152). No reply whatever is made by Merrill Lynch to *that* testimony. Merrill Lynch fails, inadvertently we are sure, to note that Greenberg's expert had terminated a customer without notice *because that customer had defrauded the broker* (Rep. Tr. p. 145, l. 20-25).

22. **Limits of 300 contracts open.** Merrill Lynch claims (p. 28) that there is no evidence that the limits of 300 contracts open ever related to anything other than one specific importation into Guatemala.

ANSWER: The limits of 300 contracts open were confirmed *after* the completion of the Guatemala transaction (Rep. Tr. p. 41). The limits of 300 open were *in addition* to the Guatemala transaction (Rep. Tr. p. 87).

23. **Greenberg's evidence.** Merrill Lynch argues (pp. 29-33) that the transcript does not support certain facts recited in our opening brief.

ANSWER: Since this contention can only be answered by an examination of the record we do not

repeat our recitation here. Each of our facts is amply supported by the transcript references; Merrill Lynch's "interpretations" are not.

24. **Greenberg as an expert witness.** Merrill Lynch deprecates (p. 30) Greenberg's testimony on trade practice on the ground that he was not an "expert".

ANSWER: Merrill Lynch's present position is somewhat at variance with its position in 1963 when Greenberg became a member of the New York commodity exchange upon the recommendation of Merrill Lynch (Rep. Tr. p. 27).

25. **Findings.** Merrill Lynch states (p. 34) that we contend the court "should have made factual findings."

ANSWER: We do not so contend.

26. **"Value of the chance".** Merrill Lynch states (p. 35) that Greenberg's counsel advanced the "value of a chance" theory as the proper measure of damages, citing R. 252, 262.

ANSWER: At R. 252 Greenberg's counsel said:
 "Our position is that the damages are measured by the value of—the difference in value of orders which were actually attempted to be placed."
 (Rep. Tr. p. 252, l. 11-13).

Greenberg's counsel was not testifying at R. 262.

In our opening brief we cited (p. 13) *Merrill Lynch v. Miller*, 401 S.W. 2d 645 for the rule that damages are measured by the difference between cost of con-

tracts wrongfully refused and their subsequent value. That case is ignored by appellee.

27. Speculative damages. Merrill Lynch cites (p. 35) two Oregon cases for the rule that prospective profits which are remote and speculative cannot be allowed.

ANSWER: Involved here are not "prospective profits" but an actual loss of a specific amount, on specific orders, the value of which was exactly fixed by the market quotations for the dates in question. No estimates of any kind are involved (Ex. 75, Rep. Tr. pp. 219-224). The law in Oregon and elsewhere is that:

"Uncertainty precluding recovery of damages relates to uncertainty whether any damages have resulted, not to damages which are the certain result of breach of contract but which are uncertain in amount." *Sol-O-Lite v. Allen*, 223 Or. 80, 353 P. 2d 843.

The law in Oregon and elsewhere is also clear that:

"The theory of the law is to award compensation for gains prevented and for losses sustained. The party who is damaged by the breach of a contract is not prevented from recovering anticipated profits merely because they are such. If it is reasonably certain that the breach of a contract has deprived the complaining party of a profit which was contemplated or can reasonably be presumed to have been contemplated by the parties at the time the contract was made, then the party committing the breach is liable for the loss of the profit." *Nelson v. Harner*, 191 Or. 359, 230 P. 2d 188.

28. **Valuation date.** Merrill Lynch states (p. 36) that "Greenberg arbitrarily selected the one day on which the contracts showed a paper appreciation".

ANSWER: The dates for valuation were fixed by the days which necessarily elapsed before Greenberg could begin trading again with another broker to protect his position (Rep. Tr. pp. 56-65, 226-227). At pretrial the court said (p. 63):

"I don't believe though in all fairness he is just picking out a date in thin air. He is picking out a date, which the court accepts as true, the first date on which he could have purchased or dealt in the futures market."

29. **"Profit" without sale.** Merrill Lynch argues (p. 36) that no "profit" was shown by Greenberg because no actual sale occurred on the valuation date.

ANSWER: The answer is given by appellee itself on the same page (36) of appellee's brief: "A customer is entitled to withdraw money from his account when it becomes 'overmargined' by appreciation of the value of the contracts." *Each day* the customer can demand from the broker his "equity", the difference between the value of his contracts *on that day* and his margin requirements; he is *not* required to wait until "the contract has been disposed of" before he gets paid by the broker, as Merrill Lynch suggests. *Each day* the profit of the customer is computed on his then pending contracts and is payable to him *on that day*, not when "the contract has been disposed of". (Rep. Tr. pp. 14-15; Ex. 72, 73).

30. **Re-execution of order.** Merrill Lynch argues (p. 38) that no damages on a refused order can be allowed unless that order has again been placed and executed elsewhere, citing *Gurley v. MacLennan* (DC, 1900) 17 App. Cases 170.

ANSWER: The cited case does not support the statement. In our opening brief (p. 14) we cited authority to the contrary and cited the court's ruling in this case to the contrary; no reply appears in appellee's brief.

31. **Exemplary damages.** Merrill Lynch argues (pp. 41-45) that in Oregon exemplary damages *cannot* be awarded in a contract case.

ANSWER: The authorities cited by appellee hold only that exemplary damages *ordinarily* are not awarded in a contract case. At pretrial (p. 72) the trial court stated that in Oregon exemplary damages may be awarded where there is a contract in which an agent breaches a fiduciary relationship. See also *Harper v. Interstate Brewery*, 168 Or. 26, 120 P. 2d 757, for an example of an award of exemplary damages in a contract case.

32. **Fiduciary relationship.** Merrill Lynch argues (pp. 45-47) that no fiduciary relationship existed between the parties, because the duties of the broker-agent terminate upon the execution of each order to buy or sell, citing *Walston v. Miller*, 100 Ariz. 48, 410 P. 2d 658.

ANSWER: Even under appellee's theory, fiduciary relationships were violated by Merrill Lynch

because *pending unexecuted* orders were wrongfully cancelled by Merrill Lynch. (See point 15, above). Second, the *facts* in this case, as previously detailed, show the continuing duty of the broker-agent long after the execution of each order to buy or sell. (See point 16, above). Third, the law in Oregon, rather than in Arizona, is as follows:

“As a general proposition, a broker’s duty is complete, and his authority ceases, when the sale is made and the receipts therefrom fully accounted for.” *Pacific Trading Co. v. Sun Ins.*, 140 Or. 314, 13 P. 2d 616.

As is strenuously argued by Merrill Lynch, in another regard in its brief (pp. 36-37) the “full accounting” does not occur, in commodity transactions, until *long after* the execution of each order to buy or sell, so that at the time in question a fiduciary relationship existed on 587 different bases, plus on the cancelled, unexecuted orders noted above.

33. Evidence of malice. Merrill Lynch argues (pp. 48-50) that there was no evidence of malice upon which punitive damages could be based.

ANSWER: The court would not permit the introduction of such evidence. This is the error we complain of. See our opening brief pp. 14-15. The evidence of malice that was before the court at the time of the ruling is outlined in our opening brief at pp. 19-20; we submit the same, despite Merrill Lynch’s attempted explanations thereof (pp. 48-50). This court, in *Lampert v. Reynolds*, 372 F. 2d 245, 246, said:

“In reversing, we held that, on the basis of the evidence described above, the jury could have found that defendant’s trespass was done knowingly and wilfully, and that it was intentional and in wanton disregard of defendant’s obligations. This, we held, was sufficient to warrant allowance of punitive damages under Oregon law. The correctness of our view there stated concerning punitive damages under the law of Oregon has recently been confirmed in *McElwain v. Georgia-Pacific Corporation*, Or., 421 P. 2d 957, decided on December 28, 1966. The Oregon Supreme Court there held that punitive damages may be recovered ‘* * * whenever there was evidence of a wrongful act done intentionally, with knowledge that it would cause harm to a particular person or persons.’”

34. **Robinson-Patman claim.** Merrill Lynch argues (pp. 50-54) that the trial court did not err in refusing to permit Greenberg to assert his Robinson-Patman claims.

ANSWER: We do not feel that Merrill Lynch’s reply answers the argument in our opening brief (pp. 21-29) at all, and therefore submit this point, with one further word: discovery on this claim had been pressed by Greenberg since April 15, 1966 (Cl. Tr. p. 105), shortly after the complaint was filed, and thereafter stoutly resisted by Merrill Lynch, as it admits. The claim was specifically made more than a month *before pretrial* (Cl. Tr. p. 434), when the material was finally produced by Merrill Lynch (Pre Trial Rep. Tr. p. 33). It did *not* involve any major

change in the case, as is amply shown in our opening brief.

CONCLUSION

We respectfully submit that the judgment and orders should be reversed as prayed in our opening brief.

Dated, San Francisco, California,
November 14, 1968.

SULLIVAN, ROCHE, JOHNSON & FARRAHAR,
Attorneys for Appellants.

✓
NO. 22563

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD LEE DAVIDSON, A 70718A, and
WALTER VERNON THOMAS, A 55727,

Appellants,

v.

WARDEN J. H. KLINGER,
California Men's Colony, and
WARDEN A. L. OLIVER,
Folsom Prison,

Appellees.

FILED

B. LUCK

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE CENTRAL
DISTRICT OF CALIFORNIA

APPELLEES' BRIEF

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD LEE DAVIDSON, A 70718A, and)
WALTER VERNON THOMAS, A 55727,)

Appellants,)

NO. 22563

v.)

WARDEN J. H. KLINGER,)
California Men's Colony, and)

WARDEN A. L. OLIVER,)
Folsom Prison,)

Appellees.)

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE CENTRAL
DISTRICT OF CALIFORNIA

APPELLEES' BRIEF

JURISDICTIONAL STATEMENT

The United States District Court has jurisdiction to entertain an application for writ of habeas corpus. 28 U.S.C.A. § 2241. A petition, prepared by counsel on this appeal, Joseph L. Armijo, Jr., and seeking appellants' release from state custody on habeas corpus, was filed by appellants in the District Court on June 13, 1967. (District Court Clerk's Transcript [hereafter referred to as D.C.C.T.], pages 3, 33.) This Court exercises jurisdiction over appeals from

final orders of the district courts in habeas corpus proceedings. 28 U.S.C.A. §§ 1291, 1294, 2253. The district court's order denying appellants' petition for writ of habeas corpus was filed September 21, 1967, and was a final order. (D.C.C.T. p. 65.) On October 10, 1967, the district judge who rendered the final order issued a certificate of probable cause under Title 28, United States Code Annotated, section 2253, allowing the present appeal to this Court. (D.C.C.T. p. 71.) On or about November 24, 1967, the district judge who rendered the final order granted appellants leave to appeal in forma pauperis. (D.C.C.T. pp. 75, 77.) On November 27, 1967, after leave of Court first obtained, notice of appeal was filed. (D.C.C.T. p. 78.)

STATEMENT OF THE CASE

Appellants, both state prisoners at the time of the proceedings below and at the present time, filed a petition for writ of habeas corpus in the district court alleging that their imprisonment was illegal in that they were convicted without representation by competent counsel. They based their claim of inadequate representation upon the failure of their counsel at the preliminary hearing and at trial to object to certain evidence which, for the first time in the district court, they characterized as the "fruit of the poisonous tree" or the product of an unlawful search and seizure. (D.C.C.T. pp. 6-9.)

Appellants sought to justify their choice of the

remedy of habeas corpus by alleging that the record of the state proceedings did not demonstrate the inadequacy of their legal representation at trial, and by asserting that therefore they must present facts outside the record. (D.C.C.T. p. 5.)

Appellants' custody arose out of their conviction in the Los Angeles Superior Court on one count of violation of California Penal Code section 245 (assault with a deadly weapon) and four counts of violation of California Penal Code section 211 (robbery). The degree of the latter offenses was fixed at robbery in the first degree. It was further determined in the state court proceedings that appellant Thomas was armed and appellant Davidson not armed at the time of the charged offenses, and that appellant Thomas had one prior felony conviction and appellant Davidson three prior felony convictions. On November 10, 1965, appellants were sentenced to state prison for the term prescribed by law, the sentence on each count to run concurrently with the sentences on the other counts. (District Court Exhibit II [Clerk's Transcript of the Superior Court proceedings], pages 74-75.)

Appellants filed notice of appeal from the state judgments of conviction. (Exh. II, pp. 76-79.) The appeal in that case is now pending in the California Court of Appeal, Second Appellate District, Division Two, as People v. Richard Lee Davidson and Walter Vernon Thomas, 2d Crim. 11971. Counsel herein, Joseph L. Armijo, Jr., was appointed to represent appellants on the state appeal. (Order of the Court of Appeal,

dated May 2, 1966, in 2d Crim. 11971.) The record in that appeal has been augmented to include the transcripts of two preliminary hearings (D.C. Exhs. III, IV) which took place on February 19, 1965 (resulting in dismissal of a narcotics violation charge against appellant Thomas), and April 9, 1965 (holding appellants to answer on the present charges on which they were ultimately convicted). (Orders of the Court of Appeal, dated June 20, 1966, and October 18, 1966.) By order of the California Court of Appeal, the time for filing Appellants' Opening Brief has been continued pending disposition of appellants' applications for writ of habeas corpus.

Appellants' applications in the California Court of Appeal and the California Supreme Court, on the identical grounds raised in the present proceedings, were denied by those courts without written opinion. (246 A.C.A. #1, Minutes for November 14, 1967, p. 7, 2d Crim. 12795; 66 A.C. #2, Minutes for March 15, 1967, p. 3, Crim. 10834.) (See also D.C.C.T. pp. 5-6.)

STATEMENT OF FACTS

(No testimony was taken in the District Court.

The matter was determined on a consideration of the Petition for Writ of Habeas Corpus, the Response, and the transcripts of court proceedings received in the District Court as Exhibits I - IV. Reference to these transcripts is made in the argument herein.)

ARGUMENT

I

APPELLANTS HAVE FAILED TO EXHAUST STATE REMEDIES AVAILABLE TO THEM

A basic prerequisite to relief on habeas corpus in a federal court is that the petitioner have exhausted all available state remedies.

28 U.S.C.A. § 2254;

Fay v. Noia, 372 U.S. 391, 438 (1963).

Although appellants presented to the California Supreme Court and the California Court of Appeal the claims of error set forth in their petition below, their appeals from the judgments of conviction contested herein are still pending. (See D.C.C.T. pp. 5-6; App. Op. Br. pp. 2-3.)

Should the judgments of conviction be reversed on other grounds, the issues involved in the present proceedings might become moot. In any event the state court reviewing appellants' convictions should have the opportunity to pass upon appellants' contentions prior to a determination, on collateral attack, by the federal courts.

Therefore, it is submitted that appellants have not exhausted their available state remedies.

See Christiansen v. O'Connor, 378 F.2d 364, 365

(9th Cir. 1967), wherein this Court held

that a state prisoner in a similar situation

had "not exhausted his state remedies in

view of the fact that his state appeal

from the criminal conviction is still pending."

See also Schiers v. People of State of California,
333 F.2d 173, 175-76 (9th Cir. 1964).

II

APPELLANTS' FAILURE, AT THE PRELIMINARY HEARING AND AT TRIAL, TO RAISE THE ISSUE OF UNLAWFUL SEARCH AND SEIZURE FORECLOSES APPELLANTS' ATTEMPT TO RAISE THAT ISSUE IN THE FEDERAL COURTS UNDER THE GUISE OF A HABEAS CORPUS ATTACK UPON THE ADEQUACY OF APPELLANTS' LEGAL REPRESENTATION IN THE STATE TRIAL COURT PROCEEDINGS

Appellants base their contention of inadequate legal representation, at the preliminary hearing and trial in the state courts, upon the failure of their counsel to object to certain evidence on the ground that such evidence was the fruit of a purportedly unlawful search and seizure. (App. Op. Br. p. 26.)

The record of appellants' trial is silent as to appellants' arrest and as to any search incidental thereto. The witnesses who testified on behalf of the State of California were the five victims, as well as one police officer who arrived at the scene of the crime after appellants had left. Neither the testimony of these witnesses nor that of the defense witnesses sheds any light upon appellants' arrest or upon any search incidental thereto. (See D.C. Exh. 1.)

As previously noted, the record in the state appeal

has been augmented to include the transcripts of two preliminary hearings which were held, respectively, on February 19, 1965, and April 9, 1965. (D.C. Exhs. III, IV.)

The April 9, 1965, hearing clearly related to the offenses for which appellants were tried, which are the offenses which appellants attacked on petition for writ of habeas corpus in the District Court. However, at the April preliminary hearing, as at the trial, no evidence pertaining to the arrest and search of appellants was received.

The February 19, 1965, preliminary hearing related to a charge of possession of marijuana against appellant Thomas only. The sole witnesses at the hearing were two Los Angeles police officers assigned to the Narcotic Division who testified that they had arrested Thomas on February 4, 1965.^{1/} (D.C. Exh. III, pp. 4, 22.) The officers had proceeded to Thomas' residence on information received from an unreliable informant, and their dual purpose was to conduct a narcotics investigation and to arrest Thomas on a traffic warrant. They searched Thomas' apartment and found a jar containing loose marijuana and several marijuana cigarettes. The officers also found some weapons on the premises. (D.C. Exh. III, pp. 19-20, 24-26, 28-29.)

It was held at the February 19, 1965, preliminary hearing that the narcotics were the product of an unlawful

^{1/} The date of the assault and robberies, for which appellants were tried and convicted, was February 3, 1965. (D.C. Exh. I, p. 20.)

search. Appellant Thomas' motions to suppress the evidence and to dismiss the complaint were granted. (D.C. Exh. III, pp. 42-43.)

However, it is not clear from the transcripts of the two preliminary hearings and the trial transcript whether the narcotics arrest and search described above produced evidence leading to appellants' arrest and conviction on the assault and robbery charges. Appellants allege that several items, including jewelry and wallets containing identification, were discovered during the course of the February 4, 1965, search and that this discovery led the police to the assault and robbery victims, culminating in the filing of a second complaint charging petitioners with the present offenses. (D.C.C.T. pp. 7, 9; App. Op. Br. p. 7.)

There is nothing in the transcript of the February preliminary hearing to indicate that at the time of the arrest or at the time of the February hearing, appellants were suspected of having committed the assault and robberies. It should also be noted that the February incident does not appear to have involved appellant Davidson in any way.^{2/}

It is elementary that matters outside the record may not be considered on appeal.

Palmer v. Hoffman, 318 U.S. 109, 116 (1943);

^{2/} Thus appellant Davidson apparently lacks standing to raise the issues set forth in the petition below and in Appellants' Opening Brief. Ker v. California, 374 U.S. 23, 34 (1963); Jones v. United States, 362 U.S. 257, 261-67 (1960).

People v. Reeves, 64 Cal. 2d 766, 776 (1966)

[51 Cal. Rptr. 691, 697], cert. denied,
385 U.S. 952 (1966).

However, in habeas corpus proceedings the court may consider evidence outside the trial record if such evidence is directed to the proof of an issue which is not open to consideration on appeal and which is cognizable in the habeas corpus proceedings.

Waley v. Johnston, 316 U.S. 101, 104-05 (1942);

Brubaker v. Dickson, 310 F.2d 30, 32 (9th Cir. 1962);

In re McVickers, 29 Cal. 2d 264, 280 (1946)

[176 P.2d 40, 47].

It is submitted that the issue of unlawful search and seizure is not an issue cognizable in the present habeas corpus proceeding.

See Eberhart v. United States, 262 F.2d 421

(9th Cir. 1958);

In re Lessard, 62 Cal. 2d 497 (1965) [42 Cal.

Rptr. 583].

The Ninth Circuit held in Eberhart:

"Assuming for the moment, that the money or the narcotics used as evidence was obtained illegally, . . . this contention should have been urged at the trial and on appeal and cannot be used in a habeas corpus or § 2255 proceeding. [Citing cases.] The reception of illegally obtained evidence would be trial error which

should be challenged on appeal if known by the defendant during the trial."

Eberhart v. United States, supra at p. 422.

See also Clemas v. United States, 382 F.2d 403, 405(n.1) (8th Cir. 1967).

But cf. People of State of California v. Hurst, 325 F.2d 891, 894 (9th Cir. 1963), rev'd on other grounds, 381 U.S. 760 (1965).

In the Lessard case the California Supreme Court

held:

"We do not believe that petitioner may at this date employ the writ of habeas corpus to attack the introduction of evidence which allegedly has been illegally obtained. Not only did petitioner's counsel fail to object at the trial to the receipt of the evidence but he . . . did not present the issue on appeal. A failure to object to the introduction of evidence which defendant alleges was illegally obtained precludes the successful presentation of the issue at the appellate level. [Citation.] Even if defendant did urge an objection at the trial level and the court allowed the evidence to be introduced, defendant cannot neglect his appeal and seize upon habeas corpus as an alternate remedy."

In re Lessard, supra, 62 Cal. 2d at p. 503

[42 Cal. Rptr. at p. 587].

Thus by reason of their failure to raise the issue of unlawful search and seizure at the state trial, appellants are precluded from raising this issue in the present habeas corpus proceedings.

As this Court recently stated under similar circumstances:

"With this record before it, the District Court was entitled, in the exercise of sound discretion, to deny relief in the situation as to the claim upon the ground that there had been a deliberate bypassing of orderly state procedures under which the claim of search and seizure could have been raised. (Citing cases.)"

Lessard v. Dickson, ____ F.2d ____ (9th Cir., No. 21513, decided April 17, 1968)

[slip opinion pp. 7-8].

The case of Henry v. Mississippi, 379 U.S. 443 (1965), upon which appellants rely (App. Op. Br. p. 29), does not help them since (1) the United States Supreme Court, in remanding the case to the lower courts for a finding on the issue of waiver, considered it significant that the defendants were represented by out-of-state counsel who apparently were unfamiliar with Mississippi procedure; (2) defense counsel at trial raised the issue of unlawful search and seizure by

moving for a directed verdict at the close of the state's case, assigning as one ground the use of illegal evidence.

See also Nelson v. People of State of California,

346 F.2d 73, 77-82 (9th Cir. 1965);

Gendron v. United States, 340 F.2d 601

(8th Cir. 1965).

Appellants allege that their failure to raise the issue of unlawful search and seizure should be excused by reason of the purportedly inadequate legal representation which they received at trial and at the April preliminary hearing.

Apparently the claim of lack of effective counsel may be made in habeas corpus proceedings despite failure to raise this issue at trial or on appeal.

See Brubaker v. Dickson, supra, 310 F.2d 30,

38-39 (9th Cir. 1962);

In re Rose, 62 Cal. 2d 384, 386 (1965)

[42 Cal. Rptr. 236, 238].

The basic question here presented is whether a defendant, by the device of framing an alleged violation of his constitutional rights in terms of his counsel's having lacked the competence to raise that purported violation at trial, may circumvent the basic rule that on appeal matters outside the record may not be considered and that habeas corpus will not lie to review matters which could have been but were not raised at trial and on appeal.

Cf. Bates v. Wilson, 385 F.2d 771, 773

(9th Cir. 1967).

Appellees submit that habeas corpus should not lie to review a claim of denial of effective counsel which claim is clearly lacking in merit and is no more than a guise designed to permit appellants to circumvent the orderly process of state appeals. To permit petitioners to proceed in habeas corpus and litigate for the first time in these proceedings the issue of unlawful search and seizure would encourage defendants in the state courts to withhold the raising of such an issue until after they had attempted, and failed, to obtain a favorable result at trial.

See In re Carmen, 48 Cal. 2d 851, 855 (1957)

[313 P.2d 817, 819], cert. denied, 355 U.S. 924 (1958).

III

THE SEARCH OF APPELLANT THOMAS' HOUSE WAS LEGAL

Appellants contend that the February 4, 1965, search of appellant Thomas' house was unlawful and that their trial counsel was incompetent by reason of his failure to object to the purported fruits of this search. (App. Op. Br. pp. 15, 26.)

At the February 19, 1965, preliminary hearing, the narcotics violation charge against appellant Thomas was dismissed for lack of evidence after the court ruled that the narcotics offered in evidence were the product of an unlawful search and seizure. (D.C. Exh. III, pp. 42-43.)

However, this determination was not res judicata as to the validity of the search, and this Court may determine under the same facts that the search was lawful.

People v. One 1960 Cadillac Coupe, 62 Cal. 2d

92, 95 (1964) [41 Cal. Rptr. 290, 292];

People v. Van Eyk, 56 Cal. 2d 471, 477 (1961)

[15 Cal. Rptr. 150, 155], cert. denied,

369 U.S. 824 (1962);

People v. Prewitt, 52 Cal. 2d 330, 339-40 (1959)

[341 P.2d 1, 6].

See also Hurst v. People of State of California,

211 F.Supp. 387, 391 (N.D. Cal. N.D. 1962),

aff'd 325 F.2d 891 (9th Cir. 1963),

rev'd on other grounds, 381 U.S. 760 (1965).

Officers Ronald Garrahan and John Olson of the Los Angeles Police Department arrested appellant Thomas on February 4, 1965. (D.C. Exh. III, pp. 4, 22.) The purpose of both officers, in proceeding to Thomas' residence on that date, was twofold: (1) to effect an arrest on an outstanding traffic warrant (D.C. Exh. III, pp. 12, 30); (2) to conduct a narcotics investigation. (D.C. Exh. III, pp. 19-20, 33.)

In addition to their knowledge of the outstanding traffic warrant, the officers had received information from a known but unreliable informant that Walter Vernon Thomas had a 1955 black and white Oldsmobile bearing the license number PCY 542, that Thomas "was living at 1048-1/5 [South] Ardmore; that Mr. Thomas was presently on parole, and that

Mr. Thomas had a sawed off shotgun and several handguns in his possession, along with marijuana and pills or tablets." (D.C. Exh. III, pp, 9, 29-30.)

On January 21, 1965, a fellow officer, a Sergeant Barr, had informed the two officers that:

". . . Thomas was dealing in narcotics; that he was working for a big narcotic pusher that they called The Big Man that lived in Monterey Park; that the defendant Thomas often made trips to the airport for The Big Man, and on one occasion this trip involved three kilos of marijuana.

"Sergeant Barr further . . . [related] that the defendant Thomas often made trips to San Francisco for The Big Man, and that he came back with wads of money.

"Sergeant Barr further . . . [related] that The Big Man had a cousin by the name of Chuck that lived in the same apartment house with him and that is where Thomas went to get his narcotics, was from Chuck.

"He further . . . [related] that Thomas was engaged in burglaries and robberies in the Los Angeles area, and that he had a .38 revolver.

"He further stated that he had what he thought was a 1956 black and white Oldsmobile

convertible."

(D.C. Exh. III, pp. 4-5.)

The officers checked the police records, obtained a picture of Thomas, and verified that Thomas had a prior narcotics violation and that Thomas was presently on parole for robbery. (D.C. Exh. III, pp. 4, 8.) Officer Olson made an unsuccessful attempt to locate Thomas' parole officer. (D.C. Exh. III, pp. 31-32.)

Shortly after receiving the telephone call from the informer, Garrahan and Olson in the company of two other officers proceeded to Thomas' residence at 1048-1/5 South Ardmore. (D.C. Exh. III, p. 9.)

Upon their arrival at the location of Thomas' residence, the officers noticed a 1955 black and white Oldsmobile bearing the license number PCY 542. This was the same vehicle and license number specified in the traffic warrant. Garrahan and another officer went to the front door and knocked. (D.C. Exh. III, pp. 8-9, 23.)

Garrahan showed Thomas his badge and stated, "'I'm a police officer.'" At that moment Garrahan observed a person run into another room. Garrahan ran into the kitchen after the person, who was then brought back into the front room although not placed under arrest. (D.C. Exh. III, pp. 9-10, 16.)

Officer Garrahan's purpose in running after the person was to "protect myself and my partner in view of the information regarding the guns and the sawed off shotgun that

was supposed to be in the apartment." (D.C. Exh. III, p. 19.)

While in the kitchen Garrahan heard someone at the back door. He then told Olson and another officer to "come around to the front," and the latter two officers then entered the house. (D.C. Exh. III, p. 10.)

The officers, Thomas, and the three other occupants of the house all went into the living room. None of the occupants of the house was handcuffed, nor did any of the officers draw his gun. (D.C. Exh. III, pp. 17-18, 24.)

Officer Olson proceeded into the bedroom, because he "was concerned as to whether there were any more people within this house. . . . [H]e also was concerned about any guns that could be in the premises." (D.C. Exh. III, p. 33.)

For these reasons he "quickly looked into a closet, . . . looked under the bed immediately to see if there were any other persons in that room, and then . . . conducted a search of the bedroom." When Olson looked under a bed he noticed a box protruding from underneath a dresser and pulled it out. Inside the box he saw a glass jar containing green leafy material and a small loose quantity of the material. Upon examining the material more closely, he formed the opinion that it was marijuana.^{3/} (D.C. Exh. III, pp. 24, 33-34.)

^{3/} It was stipulated at the preliminary hearing that Olson had sufficient training to recognize marijuana, and that the substance was marijuana. (D.C. Exh. III, p. 25.)

Officer Olson returned to the living room and advised all the occupants of the house that they were under arrest for possession of marijuana. Olson then advised the suspects of their constitutional rights. (D.C. Exh. III, pp. 24-25.)

Olson continued his search of the bedroom. He found several handguns and a sawed-off shotgun. He also found two partially burned cigarettes, which appeared to contain marijuana, inside a nightstand, and recovered a similar cigarette and a number of tablets from the top drawer in the dresser.^{4/} (D.C. Exh. III, p. 26.)

Insofar as the February 4, 1965, arrest of appellant Thomas and the search of his house complied with the general requirements of probable cause in the Fourth and Fourteenth Amendments to the federal Constitution, "the lawfulness of . . . [this arrest] by state officers for state offenses is to be determined by California law," since the State is free to develop "workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement'"

Ker v. California, supra, 374 U.S. 23, 34, 37-38 (1963).

Under California law a police officer may make an arrest "[w]henever he has reasonable cause to believe that the person to be arrested has committed a felony"

^{4/} It was also stipulated that the cigarettes contained marijuana. (D.C. Exh. III, pp. 27-28.)

Pen. Code § 836. The police need not procure an arrest warrant or search warrant merely because it might have been practicable to do so.

United States v. Rabinowitz, 339 U.S. 56, 65-66 (1950);

Pen. Code § 836;

People v. Winston, 46 Cal. 2d 151, 162-63 (1956)

[293 P.2d 40, 46-47].

Probable or reasonable cause "has been generally defined to be such a state of facts as would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime."

People v. Ingle, 53 Cal. 2d 407, 412 (1960)

[2 Cal. Rptr. 14, 17], cert. denied,

364 U.S. 841 (1960).

It cannot be doubted that the officers had the right to investigate the information which they had received from the known but unreliable informant. They would have been remiss in their duty had they not followed up this lead, notwithstanding the fact that the information then in their possession would not have been sufficient in itself to justify the arrest of Thomas or a search of his premises. Furthermore, the officers had the right and the duty to arrest Thomas on the outstanding traffic warrant.

"[I]t is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes." People v. Michael, 45 Cal. 2d

751, 754 (1955) [290 P.2d 852, 854]. The observations of the officers during the course of such a permissible visit may give them additional information which, combined with their previously held information, will afford them probable cause for an arrest.

People v. Martin, 45 Cal. 2d 755, 761 (1955)

[290 P.2d 855, 858].

When Thomas opened the door and Garrahan identified himself as a police officer, the officers observed a figure flee into another room. This furtive conduct, in the context of the officers' prior information that Thomas was a convicted robber and narcotics violator and that there were handguns and a sawed-off shotgun inside the house, justified the officers in quickly entering the house, locating the occupants, and searching the premises for weapons in order to protect themselves.

People v. Smith, 63 Cal. 2d 779, 797 (1966)

[48 Cal. Rptr. 382, 394], cert. denied,
388 U.S. 913 (1967);

People v. Blodgett, 46 Cal. 2d 114, 117 (1956)

[293 P.2d 57, 58];

People v. Witt, 159 Cal. App. 2d 492, 494-97

(1958) [324 P.2d 79, 81].

See also Wilson v. Porter, 361 F.2d 412

(9th Cir. 1966), and cases cited therein.

During the search for weapons (weapons ultimately were discovered), the police "were not compelled to close

their eyes to the contents of the house, and their ensuing search was incidental to the purpose of their entry The evidence obtained by that search was properly admitted."

People v. Smith, supra, 63 Cal. 2d at p. 798

[48 Cal. Rptr. at p. 395].

See also People v. Wright, 153 Cal. App. 2d 35, 37-40 (1957) [313 P.2d 868, 870-71];

People v. Jiminez, 143 Cal. App. 2d 671, 672-75 (1956) [300 P.2d 68, 70-71].

Having found the marijuana the officers clearly had probable cause to arrest the occupants of the house. The officers had the right to make a further search of the premises incident to these valid arrests. In re Dixon, 41 Cal. 2d 756, 761-62 (1953) [264 P.2d 513, 516]. This search could precede or follow the formal arrests.

People v. Ingle, supra, 53 Cal. 2d 407, 413 (1960)

[2 Cal. Rptr. 14, 17].

Appellees submit that the February 4, 1965, arrest of appellant Thomas, and the search of his house, were lawful.

IV

REGARDLESS OF WHETHER THE SEARCH WAS LAWFUL, THE FAILURE OF APPELLANTS' TRIAL COUNSEL TO RAISE THE ISSUE OF UNLAWFUL SEARCH AND SEIZURE DID NOT DEPRIVE APPELLANTS OF THE RIGHT TO REPRESENTATION BY COMPETENT COUNSEL, PARTICULARLY SINCE THE TESTIMONY OF EYEWITNESSES IS NOT WITHIN THE DOCTRINE BARRING FROM EVIDENCE THE FRUIT OF AN UNLAWFUL SEARCH

Appellants claim (App. Op. Br. p. 29) that they were denied the constitutional right to representation by competent counsel at the preliminary hearing and trial upon the assault

and robbery charges by reason of the failure of their counsel to explore whether or not certain wallets, which contained identification and which were taken from the robbery victims by appellants and returned to the victims by the police (D.C. Exh. I, pp. 103-04, 149, 185-86), were seized by the officers during the course of the arrest of appellant Thomas and the search of his house on February 4, 1965, the day following the robberies. (D.C. Exh. I, p. 20.) Appellants claim that if these wallets and identification were obtained by the police in this manner, it must be assumed that this evidence was the sole factor that led the police to the eyewitness victims who testified against appellants on the robbery charges, and that therefore this testimony came within the doctrine barring from evidence the fruit of an unlawful search and seizure. (App. Op. Br. p. 16.)

Appellants rely principally upon the cases of Brubaker v. Dickson, supra, 310 F.2d 30 (9th Cir. 1962), cert. denied, 372 U.S. 978 (1963), and People v. Ibarra, 60 Cal. 2d 460 (1963) [34 Cal. Rptr. 863], in support of their claim of inadequate counsel.

The Brubaker opinion states:

"The test to be applied in determining the legal adequacy of the allegations of appellant's petition is readily stated:

'The requirement of the Fourteenth Amendment is for a fair trial'; . . . the due process clause 'prohibits the conviction and incarceration of one whose trial is offensive to

the common and fundamental ideas of fairness and right.' . . .

". . . . Appellant was entitled to 'effective aid in the preparation and trial of the case.' . . .

"This does not mean that trial counsel's every mistake in judgment, error in trial strategy, or misconception of law would deprive an accused of a constitutional right Due process does not require 'errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.' . . . Determining whether the demands of due process were met in such a case as this requires a decision as to whether 'upon the whole course of the proceedings,' and in all the attending circumstances, there was a denial of fundamental fairness; . . . it is inevitably a question of judgment and degree." (Emphasis by the Court.)

Brubaker v. Dickson, supra at p. 37.

The Ibarra case sets forth the rule that in order to justify relief on the ground of incompetent counsel,

". . . . 'an extreme case must be disclosed.'

[Citations.] It must appear that counsel's lack of diligence or competence reduced the

trial to a 'farce or a sham.' [Citations.]"

People v. Ibarra, supra, 60 Cal. 2d at p. 464

[34 Cal. Rptr. at p. 866].

In the Ibarra case the California Supreme Court found that the defendant's trial counsel had been unaware of a "commonplace" "rule of law basic to the case; a rule that reasonable preparation would have revealed."

People v. Ibarra, supra, 60 Cal. 2d at pp. 465-

66 [34 Cal. Rptr. at pp. 866-67].

Appellees submit that an examination of the record in the proceedings below demonstrates that appellants received an able and effective defense and that appellants' contention to the contrary is merely a vehicle by which appellants seek to raise new (and meritless) issues outside the record.

Furthermore, defense counsel at the state proceedings indicated that they were not ignorant of the possible applicability of the "fruit of the poisonous tree" doctrine when they moved for exclusion of evidence of the police officers' having returned certain wallets and watches to the victims.^{5/} (D.C. Exh. I, pp. 201-10.) It cannot be said that the exercise of normal diligence would have required

^{5/} The trial court reserved its ruling on the motion. It appears from the record that the trial court was not subsequently pressed for a ruling and that none was ever made. The failure of appellants' counsel to procure a ruling on the motion was the equivalent of a failure to so move. People v. Brown, 238 Cal. App. 2d 924, 929 (1965) [48 Cal. Rptr. 204, 206-07]; People v. Valdez, 188 Cal. App. 2d 750, 758 (1961) [10 Cal. Rptr. 664, 667-68].

counsel in the trial proceedings to advance the somewhat attenuated contentions made by appellants in the present proceedings.

See Bates v. Wilson, supra, 385 F.2d 771, 773

(9th Cir. 1967);

Rivera v. United States, 318 F.2d 606, 608

(9th Cir. 1963).

The following authority seems to demonstrate that it is appellants, rather than their trial counsel, who are unaware of a basic rule of law. That rule is the inapplicability to eyewitness testimony, under the present circumstances, of the doctrine barring from evidence the fruit of an unlawful search and seizure.

Even if the truth of appellants' allegation is assumed, arguendo, regarding the police's having located the assault and robbery victims by means of wallets and identification purportedly found in appellant Thomas' apartment during the course of an unlawful search, appellants have failed to make an adequate showing that the search actually provided the evidence leading to their conviction.

The United States Supreme Court has held:

". . . . [T]he exclusionary rule has no application . . . [where] the Government learned of the evidence 'from an independent source,' Silverthorne Lumber Co. v. United States, 251 U.S. 384, 392; nor . . . [where] the connection between the lawless conduct of the police and the discovery

of the challenged evidence has 'become so attenuated as to dissipate the taint.' Nardone v. United States, 308 U.S. 338, 341. We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)" (Emphasis added.)

Wong Sun v. United States, 371 U.S. 471, 487-88 (1963).

See also Hoffa v. United States, 385 U.S. 293, 308-09 (1966);

Nardone v. United States, 308 U.S. 338, 341 (1939).

The District Court characterized "the basic question here presented" as follows:

"Can the voluntary testimony of a witness in a criminal case be excluded merely because the identity of the witness was learned from information obtained through an illegal search and seizure?"

The District Court answered this question in the negative and relied greatly on the Wong Sun opinion in arriving at its conclusion that since "the victims testified voluntarily and without compulsion or influence being imposed upon them by illegally seized evidence, certainly the arrest and their testimony had become so attenuated as to dissipate any taint." (D.C.C.T. p. 68.)

Similarly in People v. Ditson, 57 Cal. 2d 415 (1962) [20 Cal. Rptr. 165], the defendants contended that certain testimony was the product or "fruit" of an inadmissible confession. The California Supreme Court, in affirming the convictions, set forth the following standard for determining whether evidence was the product of unlawfully obtained evidence:

The trier of fact ". . . must exercise great care to determine . . . [whether] the asserted 'fruits' of the confession . . . were in fact a product of that confession and would not have been otherwise discovered by the police from information already in their possession or independently acquired."

(Emphasis by the Court.)

People v. Ditson, supra, 57 Cal. 2d at pp.

443-44 [20 Cal. Rptr. at p. 181].

The Court in Ditson found that the act of one of the defendants during an invalid confession, in naming two

individuals, one of whom later testified and led the police to the discovery of other future witnesses,

" . . . was no evidence but merely a 'lead' in the process of investigation which had begun before defendants' arrest and had furnished the prosecution with all the evidence necessary to convict defendant"

People v. Ditson, supra, 57 Cal. 2d at p. 444

[20 Cal. Rptr. at p. 181].

See also People v. Garay, 247 Cal. App. 2d 833,

837-38 (1967) [56 Cal. Rptr. 55, 57-58].

The most recent decisions of the United States Supreme Court have reiterated the rule that prior illegal conduct by the police relating to identification of the defendant will not per se require the exclusion of subsequent evidence of identification.

United States v. Wade, 388 U.S. 218, 239-

43 (1967);

Gilbert v. California, 388 U.S. 263, 272 (1967).

In the present proceeding, unlike the Wade and Gilbert cases, the record does "permit an informed judgment whether the in-court identifications at the . . . trial had an independent source."

Gilbert v. California, supra at p. 272.

The practice condemned in those cases, the conducting of a police lineup without notice to the attorney of an indicted suspect, could easily taint the subsequent courtroom

identification by the victim.

In the absence of counsel at the lineup, the police could without detection by the suspect employ

". . . instances of suggestive procedures, for example, that all in the lineup but the suspect were known to the identifying witness, that the other participants in a lineup were grossly dissimilar in appearance from the suspect, that only the suspect was required to wear distinctive clothing which the culprit allegedly wore, that the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail, that the suspect is pointed out before or during a lineup, and that the participants in the lineup are asked to try on an article of clothing which fits only the suspect." (Footnotes omitted.)

United States v. Wade, supra, 388 U.S. 218, 233.

"[T]here is grave potential for prejudice, intentional or not, in the pre-trial lineup, which may not be capable of reconstruction at trial"

Supra at p. 236.

". . . . The lineup is most often used . . . to crystallize the witnesses' identification

of the defendant for future reference. . . ."

Supra at p. 240.

In contrast, any illegality in the conduct of the police in obtaining the names of the robbery victims who testified at appellants' trial could not in any way have affected the substance or truthfulness of the victims' testimony at the trial identifying appellants as the perpetrators of the offenses charged. The names which the police might have obtained by reason of their search of appellant Thomas' house were "not evidence but merely a 'lead' in a process of investigation."

People v. Ditson, supra, 57 Cal. 2d 415, 444

(1962) [20 Cal. Rptr. 165, 181].

Analogous to the present situation are those cases involving identification by a witness during a period of unlawful detention (not involving a police lineup).

In Payne v. United States, 294 F.2d 723 (D.C. Cir. 1961), cert. denied, 368 U.S. 883 (1961), the Court of Appeals rejected the defendant's contention that the witness' courtroom identification of the defendant was inadmissible by reason of a prior identification, not alluded to at the trial, which had taken place during a period of unlawful detention. The court held:

" . . . The consequences of accepting appellant's contention in the present situation would be that . . . [the witness] would be forever precluded from testifying against

Payne in court, merely because he had complied with the request of the police that he come to police headquarters and had there identified Payne as the robber. Such a result is unthinkable. The suppression of the testimony of the complaining witness is not the right way to control the conduct of the police, or to advance the administration of justice. . . ."

Payne v. United States, supra at p. 727.

The Payne decision cites with approval the opinion in Bynum v. United States, 274 F.2d 767 (D.C. Cir. 1960), cert. denied, 379 U.S. 908 (1964), wherein the court affirmed a conviction after a trial in which "the prosecutor introduced a fingerprint other than that taken during the period of illegal detention, but which he was able to obtain because he knew . . . [the defendant's] identity as a result of the fingerprints taken during that period."

Payne v. United States, supra at p. 726.

Similarly in Smith v. United States, 324 F.2d 879 (D.C. Cir. 1963), cert. denied, 377 U.S. 954 (1964), where a witness was found as a result of information obtained while the defendants were illegally in custody, it was held:

"Courts have gone a long way in suppressing evidence but no case as yet has held that a jury should be denied the testimony of an eye-witness to a crime because of the circumstances



in which his existence and identity was learned. However, in our view, the relationship between the inadmissible confessions and . . . [the witness'] testimony in the District Court months later is so attenuated that there is no rational basis for excluding it. No case has been cited to us in which the testimony of an eyewitness or factual witness has been excluded because his identity was discovered as a result of disclosures made by an accused during detention violative of Rule 5(a) Fed.R. Crim. P. . . .

" . . .

"Here no confessions or utterances of the appellants were used against them; tangible evidence obtained from appellants, such as the victim's watch, was suppressed along with his confessions. But a witness is not an inanimate object which like contraband narcotics, a pistol or stolen goods, 'speak for themselves.' The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and

volition interact to determine what testimony he will give. . . . The uniqueness of this human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence. . . ."

Smith v. United States, supra at pp. 881-82.

See also People v. Van Eyk, supra, 56 Cal. 2d 471, 480 (1961) [15 Cal. Rptr. 150, 155], cert. denied, 369 U.S. 824 (1962).

Appellees submit that to extend the doctrine, which bars from evidence the product of an unlawful search, to the remote purported consequences of the search in the present case would not be in keeping with the rationale of the doctrine. Certainly the police in conducting the search were acting in good faith and could not have hoped to uncover evidence of the assault and robberies of which they were apparently unaware. To bar from evidence the testimony of the victims because there was a possibility that the wallets were found during the search of appellant Thomas' house and unexpectedly connected appellants to the present offenses would not serve to deter improper conduct on the part of the police. Such an extension of the rule would only needlessly penalize the police and would in effect contravene the well established rule that an unlawful arrest does not render a defendant immune from prosecution.

Frisbie v. Collins, 342 U.S. 519, 522-23 (1952);

People v. Valenti, 49 Cal. 2d 199, 203^{6/}

(1957) [316 P.2d 633, 635].

In support of appellees' position that the testimony of the eyewitness victims is not within the "fruit of the poisonous tree" doctrine is the affirmative evidence in the record that at least one of the victims had described "some of the suspects" to the police. (D.C. Exh. I, pp. 194-95.) This occurred when police officers arrived at the scene shortly after the assault and robberies had taken place. (D.C. Exh. I, pp. 21, 190-91.) It must be assumed that this description fit the suspects.

People v. Sandoval, 65 Cal. 2d 303, 308-09

(1966) [54 Cal. Rptr. 123, 125], cert.

denied, 386 U.S. 948 (1967);

People v. Cantley, 163 Cal. App. 2d 762, 767

(1958) [329 P.2d 993, 996].

It seems permissible to infer that the victims informed the police that they had been robbed and that the victims gave the police some sort of description of the robbers. Thus presumably the police were conducting an investigation of the assault and robberies on February 3, 1965. It should not be assumed that absent the purported discovery of the victims' wallets and identification during the course of a purportedly unlawful search on February 4,

6/ Disapproved on other grounds in People v. Sidener, 58 Cal. 2d 645, 647 (1962) [25 Cal. Rptr. 697, 698], appeal dismissed, 374 U.S. 494 (1963).

1965, the police would never have been able to connect appellants with the assault and robberies concerning which five eyewitness victims were able to testify at trial. Furthermore, the asserted violation of appellants' constitutional rights had no bearing on the question of appellants' guilt.

Cf. In re Davis, 242 Cal. App. 2d 645, 649
(1966) [51 Cal. Rptr. 702, 704].

Finally, it should be noted that evidence in the record concerning the action of the police in returning the wallets (containing identification) to the victims at the time of the April preliminary hearing is only mildly suggestive of the police's having obtained these items by means of a search of appellants' premises, let alone by means of the particular search which took place on February 4, 1965. (D.C. Exh. I, pp. 149, 185-86.) The evidence appears to be equally consistent with the possibility that the wallets were found discarded in a trash can and subsequently came into the hands of the police, as is often the case in a robbery investigation.

Even if a defendant "has no opportunity to develop facts that may show that essential evidence was illegally obtained, if the record is silent on this question, it must be presumed that the officers acted lawfully."

People v. Prewitt, supra, 52 Cal. 2d 330, 335
(1959) [341 P.2d 1, 3].

Appellees submit that under the facts alleged by appellants, and in light of the record in the pending state appeal, a sufficient showing has not been made that the

testimony of the eyewitness victims was the product of an unlawful search and seizure. Thus appellants' claim that they were denied the aid of effective counsel by reason of counsel's failure to object on this tenuous and unapparent ground must fail. Certainly appellants have not made the requisite showing that their trial was reduced to a farce or a sham by the legal representation they received.

See Bates v. Wilson, supra, 385 F.2d 771, 773

(9th Cir. 1967).

The record does not support appellants' assertion (App. Op. Br. pp. 9, 28) that appellants or their counsel at the trial had knowledge of the purported fact that during the search of appellant Thomas' house the police seized wallets containing identification which ultimately led the police to the victims of the robbery. (D.C. Exh. I, pp. 186-93, 201-10.)

Furthermore, this assertion suggests that such knowledge by trial counsel would negate appellants' argument that they were denied the right to competent counsel, since the denial of this right hinges upon counsel's ignorance of a rule of law basic to the case.

Brubaker v. Dickson, supra, 310 F.2d 30, 38-39

(9th Cir. 1962);

People v. Ibarra, supra, 60 Cal. 2d 460, 465-

66 (1963) [34 Cal. Rptr. 863, 866-67].

/

/

/

CONCLUSION

For the foregoing reasons it is requested that the order of the District Court denying appellants' Petition for Writ of Habeas Corpus be affirmed:

Respectfully submitted,

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By /s/ Ronald M. George
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CR LA 67-763

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the Rules of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Ronald M. George

RONALD M. GEORGE
Deputy Attorney General

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

_____, being first duly sworn, deposes
and says:

That he is a citizen of the United States, a resident
of Los Angeles County, over 18 years of age, not a party to
the within cause, and employed as a clerk in the Los Angeles
Office of the Attorney General of the State of California,
who is one of the attorneys for appellees in the above entitled
matter; that the person listed below is attorney for appellants
in the within cause:

JOSÉ L. ARMIJO, JR., Esq.
Attorney at Law
265 East Carson Street
Torrance, California 90502

that there is delivery service by United States mail at the
place so addressed, and there is a regular communication by
mail between the place of mailing and the place so addressed;
that affiant enclosed three (3) copies of Appellees' Brief in
an envelope addressed to said person set forth above; that
affiant sealed said envelope and deposited same in a United States
Post Office mailbox located at the State Building, Los Angeles,
California, on the ____ day of May, 1968, with postage thereon
fully prepaid.

Subscribed and sworn to before me
This ____ day of May, 1968.

/s/ Helen Anderson

No. 22,565

IN THE

**United States Court of Appeals
For the Ninth Circuit**

PACIFIC CAR AND FOUNDRY COMPANY,

Petitioner,

VS.

HONORABLE MARTIN PENCE, United States District Judge, District of Hawaii, and L. C. O'NEIL TRUCKS PTY. LIMITED,

Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF MANDAMUS**

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FILED

MAR 15 1968

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VS.

HONORABLE MARTIN PENCE, United States District Judge, District of Hawaii, and L. C. O'NEIL TRUCKS PTY. LIMITED,

Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF MANDAMUS**

I

STATEMENT OF THE CASE

Respondent L. C. O'Neil Trucks Pty. Limited (hereinafter O'Neil) is an Australian corporation which, during its active existence, was engaged in the business of selling trucks manufactured by petitioner Pacific Car and Foundry Company (hereinafter PCF).

On August 31, 1967 O'Neil filed a complaint in the United States District Court in Honolulu charging PCF with violations of Sections 1 and 2 of the Sherman Act. (15 U.S.C. 1, 2.) The complaint alleges that PCF acquired the Kenworth Motor Truck Company in 1945;

acquired the Peterbilt Motor Company in 1958; that both Kenworth and Peterbilt produce heavy duty trucks which are substantially identical, and that the Peterbilt and Kenworth divisions of PCF operate independently and actually compete with each other. The complaint alleges that O'Neil was formed for the purpose of selling Peterbilt trucks produced by PCF and that it performed this function from mid-1963 through the end of 1965, when it was appointed a Kenworth distributor by PCF. The complaint alleges that this appointment was terminated in early 1967.

The complaint then charges—with an unusual degree of specificity for an antitrust case—that PCF, by conspiring with a distributor-competitor of O'Neil to eliminate the latter from the business of distributing heavy duty trucks in Australia, violated Section 1 of the Sherman Act. The complaint also alleges that PCF, acting unilaterally, engaged in a purposeful plan and program to monopolize the export of heavy duty trucks from the United States to Australia in violation of Section 2 of the Sherman Act and that its manipulation and ultimate termination of O'Neil constituted part of that plan and program. O'Neil alleges damages in the amount of \$2,750,000.

In October 1967, PCF moved to dismiss or transfer the action to the Western District of Washington (pursuant to 28 U.S.C. 1406(a)) or, in the alternative, to transfer the action to the United States District Court for the Western District of Washington (pursuant to 28 U.S.C. 1404(a)). (R. 23-45.) PCF urged, in support of these motions, that (1) it was neither found nor transacting business in the State of Hawaii, and, *arguendo*

(2) that the District of Hawaii was an inconvenient forum in which to litigate this action.

On December 26, 1967, the District Court (Chief Judge Martin Pence, Respondent herein) filed an "Order Denying Defendant's Motions to Quash Return of Summons, to Dismiss or Transfer Pursuant to 28 U.S.C. 1406(a), and for Change of Venue Under 1404(a)". (R. 106-113.)

On February 21, 1968, this Court granted leave to review this ruling by petition for a writ of mandamus.

Substantial discovery has taken place. Pursuant to a stipulated Pre-Trial Order No. 1 (appended hereto as Exhibit A), both sides have produced considerable books, files and records for inspection and copying by the other. Plaintiff has voluntarily produced two of its key officers in Seattle for the taking of their depositions (agreed to be concluded in Australia). Plaintiff has taken the depositions of two of the highest PCF officials involved in the activities challenged in the lawsuit.

In late January 1968, prior to filing of the petition herein, O'Neil filed (1) proposed Pre-Trial Orders Nos. 2 and 3 designed to guide the balance of discovery, establish a "cut-off" date for discovery and fix a trial date (suggested for December 1968), (2) a second Motion to Produce under Rule 34, (3) First Set of Interrogatories, and (4) Notice of Taking Depositions, consisting of one deponent in Hawaii, two in Australia and three in Seattle.¹

All of the discovery recited hereinabove took place *after* the Court had denied defendant's motion to quash return

¹These documents are appended hereto as Exhibits B-E for such consideration as the Court may choose to give them.

of summons, dismiss for lack of venue, or transfer to Seattle. (R. 43-45.)

II

APPLICABLE STATUTES

Section 1 of the Sherman Act (15 U.S.C. 1) provides in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

Section 2 of the Sherman Act (15 U.S.C. 2) provides in pertinent part:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . .

Section 4 of the Clayton Act (15 U.S.C. 15) provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 12 of the Clayton Act (15 U.S.C. 22) provides:

Any suit, action, or proceeding under the anti-trust laws against a corporation may be brought not

only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

28 U.S.C. 1404 provides:

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

28 U.S.C. 1406:

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.

(c) If a case within the exclusive jurisdiction of the Court of Claims is filed in a district court, the district court shall, if it be in the interest of justice, transfer such case to the Court of Claims, where the case shall proceed as if it had been filed in the Court of Claims on the date it was filed in the district court.

III

ISSUES PRESENTED

1. Is mandamus an appropriate remedy to review a district court ruling denying motions to dismiss and quash service for lack of venue, where the ruling is made upon the lower court's findings of fact that defendant "transacts business" within the forum?

2. Assuming, *arguendo*, that mandamus is an appropriate method for reviewing such a ruling, should this Court, in the exercise of its discretion, issue mandamus where the totality of the facts persuasively demonstrates that defendant has sufficient contact with the district as to make it reasonable, in a constitutional sense, that it defend the lawsuit in the chosen forum?

3. In light of the federal policy facilitating the litigation of antitrust claims in the plaintiff's chosen forum, did the court below abuse its discretion in denying petitioner's motions for transfer by holding that petitioner had not demonstrated that the interest of justice would be served by transfer, particularly where plaintiff was an Australian corporation which had chosen the forum closest to its domicile and place of business?

IV

**MANDAMUS IS NOT AN APPROPRIATE MEANS OF REVIEWING
THE DENIAL OF A MOTION TO DISMISS OR QUASH BASED
ON LACK OF VENUE WHERE THE DENIAL RESTS UPON
FACTUAL DETERMINATIONS**

This Court pointed out in *American Concrete Agricultural Pipe Assn. v. No-Joint Concrete Pipe Co.*, 331 F.2d 706, 709 (9th Cir. 1964), that the granting of leave to file an application for a writ of mandamus does not preclude the respondent from urging that mandamus is an inappropriate remedy. Nor does it preclude this Court from making such a determination after granting leave to file.

In *Will v. United States*, 88 S. Ct. 269 (1967), the Supreme Court of the United States said that “the party seeking mandamus has the burden of showing that its right to issuance of the writ is ‘clear and indisputable’ ”. (88 S. Ct. at 274.) Holding that mandamus was erroneously granted by the Court of Appeals, the Court said:

“Thus the most that can be claimed on this record is that [the District Judge] may have erred in ruling on matters within his jurisdiction * * * But the extraordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals. Mandamus, it must be remembered, does not run the gauntlet of reversible errors * * * Its office is not to control the decision of the trial court, but rather merely to confine the lower court to the sphere of its discretionary power”. (88 S. Ct. at 278.)

Mandamus is not an appropriate method of reviewing denial of the dismissal motion. In *Bankers' Life & Casu-*

alty Co. v. Holland, 346 U.S. 379, 74 S. Ct. 185 (1953), the Court said that mandamus is “. . . meant to be used only in the exceptional case where there is clear abuse of discretion or ‘usurpation of judicial power’ . . .”. (346 U.S. at p. 383.) Here, we submit, there is neither abuse of discretion nor usurpation of judicial power.

In *American Concrete Agricultural Pipe Assn. v. No-Joint Concrete Pipe Co.*, this Court said “we will assume that, under this statute, [28 U.S.C. 1651(a)] we have power to review by mandamus a district court order denying, without prejudice, motions to dismiss a complaint for lack of venue and personal jurisdiction, and denying without prejudice a motion to quash service. (331 F.2d at 709; emphasis added.)

In the *No-Joint* case, the district court order which this Court agreed to review by mandamus—and as to which it subsequently denied relief—denied the dismissal motion for two reasons. The first was based upon this Court’s ruling in *Guisti v. Pyrotechnic Industries, Inc.*, 156 F.2d 351 (9th Cir. 1946) which held that a foreign corporation not otherwise doing business in California, transacts business in California through the acts of co-conspirators so that the foreign corporation is subject to suit under the antitrust laws in California. The alternative ground on which the lower court in *No-Joint* denied the motion to dismiss was that, apart from the *Guisti* case, the plaintiff’s affidavits (without benefit of discovery) outlined the “business transacted” in California to an extent that the lower Court held that plaintiff should have an opportunity to establish *as a fact* that the moving defendant did transact such business.

In denying mandamus, this Court said that it was unnecessary to review the propriety of the *Guisti* rationale because the *fact* issues regarding venue have not yet been resolved and “were not ripe for review at this time”. (331 F.2d at 710.) This Court said that

“When the facts are developed in the evidence and *found by the court*, it may turn out that this basis for venue is adequate. It follows that consideration of the *Guisti* phase of the venue question is premature and may even become moot”. (331 F.2d at 710; emphasis added.)

We read this decision as indicating that this Court granted leave to file the mandamus petition to review what appeared to be “the scope of an important federal statute and the interpretation of a prior opinion of this Court [*Guisti*] as to which there is a direct conflict among the judges of the district court”. (331 F.2d at 709.) Finding that resolution of that question was not necessary, this Court suggested that it would not review by mandamus a ruling based on facts “found by the court” that venue was properly laid.

In connection with the denial of the motions to dismiss and quash, we have only the lower court’s application to the facts of this case of the standards set out in *Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders & Exhibitors Assn.*, 341 F.2d 860 (9th Cir. 1965). To the extent that the district court’s opinion explains the relationship of the holding in *Courtesy Chevrolet* to this Court’s prior decision in *L. C. Reeder Contractors of Arizona v. Higgins Industries, Inc.*, 265 F.2d 768 (9th Cir. 1959), it involves an *explanation* which is, we submit,

sufficiently clear and discernible from the *Courtesy Chevrolet* opinion itself. Certainly there is no conflict on this question among judges of district courts within this Circuit adequate to warrant review of the decision below by extraordinary writ. Accordingly, respondent urges denial of the writ so far as it seeks review of the rulings on the motions to dismiss and quash for lack of venue on the threshold ground that, in the circumstances presented, mandamus is not an appropriate remedy and should not issue.

V

SUMMARY OF ARGUMENT

Assuming, *arguendo*, the Court concludes that mandamus may be used to review factual determinations on the basis of which a district court denies motions to dismiss and quash for lack of venue, we submit that here Judge Pence's findings are amply supported by the record and in no way involve an abuse of discretion or usurpation of judicial power.

We recognize that mandamus is now regarded as an appropriate means of reviewing orders denying transfer motions, but submit that here Judge Pence carefully considered all of the equities, balanced them against appropriate and well recognized legal standards and properly concluded that transfer was not in the interest of justice.

A. Denial of the Motions to Dismiss and Quash Service:

Venue in private antitrust litigation against a corporate defendant lies, *inter alia*, wherever the corporation "transacts business". Congress purposefully gave great

latitude to antitrust plaintiffs in selecting forums so as to facilitate the institution and prosecution of such litigation recognizing it to be an important part of overall antitrust enforcement. This Court, following the mandate of the Supreme Court, has consistently ruled that the antitrust venue statute was to be construed liberally. The legal standard, according to prior decisions of this Court, is whether, in an everyday sense, and considering the “totality of all the facts”, the defendant is transacting business within the forum to a degree that it would not be unreasonable—in a constitutional sense—to require it to defend a lawsuit there. And this Court, based on a careful reading of the legislative history, has expressly rejected the notion that venue is limited to the place where the alleged injury was inflicted.

In determining whether more than a constitutionally required minimal contact is found in any given case, the Court must consider all of the facts wholly. Judge Pence on the basis of essentially uncontroverted facts found that petitioner had three distributors based in Hawaii to whom it made sales of trucks, and that these distributors, who were contractually subject to petitioner’s control in several important ways, were the conduits through whom petitioner’s products were sold in the State of Hawaii. Judge Pence found that during a period of some 16 months at least 6 trips were made by high echelon sales management officials to Hawaii for the purpose of conducting petitioner’s business in that State. Judge Pence also found that one of O’Neil’s incorporators resided in Hawaii during the period he negotiated with petitioner for the Peterbilt distributorship in Australia and that,

while a resident of Hawaii, he wrote to and received a letter from petitioner in furtherance of those negotiations. Finally, Judge Pence found that petitioner's executives came to Hawaii to discuss with Hawaiian residents the prospect of investment in the Australian-based business of O'Neil.

If it can be said on the basis of this record that it is unreasonable to require petitioner to defend the case in Hawaii because its contacts are too minimal and remote—particularly where the plaintiff cannot sue at its own place of business—then we respectfully submit that this Court will have emasculated its prior and recent rulings according liberality to plaintiffs under the antitrust venue statute. A holding that venue is not established on these facts would permit any manufacturer to evade suit for acts committed in a jurisdiction where it conducts business through independent distributors and would thereby force injured persons to pursue the manufacturer *to its headquarters* there to litigate the grievance. Such an antediluvian notion of antitrust policy would hardly be consistent with the recent rulings of this Court much less the older pronouncements of the Supreme Court. The petition for writ of mandamus as to the denial of the motions to dismiss and quash must be denied.

B. Denial of the Transfer Motions Was Wholly Within the Court's Power and the Exercise of Its Discretion:

A motion for transfer under 28 U.S.C. 1404(a) is addressed to the sound discretion of the District Court.²

²Under 28 U.S.C. 1406 no discretion is involved except that the Court may, in lieu of dismissing for lack of venue, transfer to an appropriate district if it so elects. Transfer under 1406 depends then on finding venue inappropriately laid.

The burden of establishing that transfer is in the interest of justice is on the moving party and, unless the evidence and circumstances of the case are strongly in favor of the transfer, the plaintiff's choice of forum should not be disturbed. Where the circumstances of each individual case are examined by the Judge in the exercise of his discretion, his determination should not be rejected unless the appellate court can say there has been a *clear* abuse of discretion. Thus, the standard is not what the members of this Court, collectively or individually, would have done had the issue been presented to them in the first instance, but rather whether the District Judge considered all the factors and properly exercised his discretion in the circumstances.

In this context we respectfully suggest that this petition does not present a close question. Each reason advanced by petitioner and the factual averments in support thereof were carefully examined by the District Court who, viewing them cumulatively, found that petitioner had not met its burden of showing that transfer was in the interest of justice. In doing so the District Judge correctly applied the applicable legal principles particularly as they have been interpreted in antitrust cases.

Guided by this Court's pronouncement that the purpose of Section 12 of the Clayton Act was to "provide broader and more effective relief, both substantively and procedurally, for persons injured by violations of its anti-trust policy",³ the Court found that plaintiff—an

³*Eastland Construction Co. v. Kcasbey and Mattison Co.*, 358 F.2d 777, 781 (9th Cir. 1966).

Australian corporation—which could not sue at the site of its alleged injury—had chosen the United States court nearest to Australia.

Petitioner's mechanical listing of every person in its employ having any connection, no matter how remote, with Australia and its arguments about the quantity and location of documents were not persuasive. In making practical judgments about the need for witnesses at trial, the utility of deposition testimony and the accessibility of documents because of modern reproduction methods, the District Judge demonstrated why resolution of such a motion is "peculiarly one for the exercise of judgment by those in daily proximity to these delicate problems of trial litigation". *Lykes Bros. S.S. Co. v. Sugarman*, 272 F.2d 679, 680 (2nd Cir. 1959).

A reading of the Court's memorandum opinion demonstrates that the respondent Judge carefully considered all the equities and balanced the conveniences. In this process he found that defendant had not demonstrated hardship or inconvenience sufficient to justify a finding that the interest of justice required transfer, considered in the light of the additional expense to which the plaintiff would be put were it required to litigate on the mainland.

Nor is there substance in respondent's argument that by use of the words "at this stage of the litigation it is impossible for this court to ascertain with any definitive approximation the burden which defendant may incur", Judge Pence actually deferred ruling on the transfer motion. In the context of the opinion it is apparent that these words do not indicate abstention. Rather than in-

dicating a failure to act, this language cogently demonstrates how a trial judge experienced in antitrust trials need *not* accept *in vacuo* a representation that 56 company employees will be required to appear at trial. Indeed, so doubtful was this proposition in the light of Judge Pence's extensive experience in the trial of antitrust cases that he was warranted in concluding that the recitation was, shall we say, tainted with exaggeration.

Thus the denial of the transfer motion involves no abuse of discretion, much less a "clear" abuse. For this reason it should not be set aside by mandamus.

VI

THE DISTRICT COURT CORRECTLY DECIDED THAT PETITIONER TRANSACTS BUSINESS IN HAWAII

A. Section 12 of the Clayton Act Must Be Liberally Construed.

This Court, speaking through the respondent Judge, in *Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders & Exhibitors Assn.*, 344 F.2d 860 (9th Cir. 1965), reversed the dismissal of an antitrust complaint for lack of venue. In doing so, this Court noted the "broad concept and objectives of 15 U.S.C. 22" in holding that "while only one act may be enough to fulfill the venue requirements of the statute, in each case it is the totality of all the facts which determines whether the defendant is doing business, or found, in a district". 344 F.2d at 865. This holding is consistent with the landmark decision of *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), in that the totality of the contacts

with the forum must be such "as to make it reasonable . . . to require the corporation to defend the particular suit which is brought . . ." in the chosen forum. (344 F.2d at 865.)

Still more recently and more explicitly this Court has pointed out, by reference to the Congressional history, the purpose of 15 U.S.C. 22. In *Eastland Construction Co. v. Keasbey and Mattison Co.*, 358 F.2d 777 (9th Cir. 1966), this Court said that the antitrust venue statute was designed "to provide broader and more effective relief, both substantively and procedurally, for persons injured by violations . . ." of the antitrust laws. 358 F.2d at 781, citing *National City Lines v. United States*, 334 U.S. 573, 581 (1948).

After an exhaustive review of the legislative history and the line of Supreme Court cases construing 15 U.S.C. 22, the Court of Appeals for the District of Columbia in *B. J. Semel Associates, Inc. v. United Fireworks Mfg. Co.*, 355 F.2d 827 (D.C. 1965), said that ". . . the venue statute with which we deal is not generalized in its reach but was intended by Congress to be an important facet in the scheme of private remedies devised to promote the objectives of the antitrust laws". 355 F.2d at 830. The Court went on to say:

The Supreme Court has pointedly reminded us of the inutility of much of this learning in construing Section 12 of the Clayton Act, and has said that we are, as has it, to seek to make effective "Congress' remedial purpose" in enacting that statute by making "the test of venue" under it a "practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character' * * *."

United States v. Scophony Corp., 333 U.S. 795, 807-808, 68 S.Ct. 855, 862, 92 L.Ed. 1091 (1948). The remedial purpose referred to in *Scophony* was clearly that identified by the Court as the relieving of “persons injured through corporate violations of the anti-trust laws from the ‘often insuperable obstacle’ of resorting to distant forums for redress of wrongs done in the places of their business or residence.” 355 F.2d at 831.

B. The District Judge’s Findings Are Amply Supported by the Record.

Cognizant, then, of the spirit in which antitrust venue motions were to be tested, the respondent Judge laboriously reviewed the essentially uncontroverted facts presented to him by the parties to determine if the “totality of all the facts” reflected whether in a “practical, everyday business or commercial concept of doing or carrying business of any substantial character” it would be “reasonable . . . to require [petitioner] to defend the particular suit” in Hawaii.

As *part* of this review, the respondent Judge analyzed the contracts between petitioner and its three Hawaii-based distributors. The District Court’s summarization of the salient features of the contract consumes two paragraphs of the memorandum decision. (R. 107-108.) Petitioner’s errors in analyzing the distributor contracts and their relation to the decision are numerous:

1. Petitioner’s argument that only a common-law agency relationship will support a claim of venue in Hawaii (petitioner’s memorandum, page 15) is a plain misstatement of the applicable law;

2. Petitioner's argument that the respondent Judge erroneously found an agency relationship between its distributors and PCF is just not supported by the court's decision;
 3. Petitioner fails to read the opinion wholly. It would prefer to isolate the PCF-distributor contracts and treat them as the sole basis on which the court below ruled. But plainly, the court considered the distributorship contracts as but one of several contacts with Hawaii.
1. No agency relationship is required to find the physically absent manufacturer transacting business in the forum.

In *B. J. Semel Associates, Inc. v. United Fireworks Mfg. Co.*, *supra*, the defendant, as here, was not physically present in the forum. Venue in the District of Columbia was based upon defendant's shipment of merchandise, f.o.b. its Dayton, Ohio plant, into the District and two "goodwill" visits to the District of Columbia since 1962 by its officers. Finding that venue was properly laid in the District of Columbia, the Court said:

We, however, are unable to believe that the spirit of *Scophony* comports with allowing the seller's shipping practices to determine his amenability to suit under Section 12. Were it otherwise, F.O.B. would always, and without more, compel the buyer to litigate on the seller's home grounds—the very result which Congress sought to avoid in Section 12.

. . . Venue is not to be found in every case simply because of an isolated transaction of modest proportions. "Transacts business", as used in the statute, imports continuity—and continuity and total volume tend to be inter-acting. As said above, we think the

volume of business was such here as to surmount any attack of a *de minimis* nature. And the wholly respectable proportions of this volume complete the picture which we think the record paints of a manufacturer who looked to the District of Columbia as one of its important markets and whose contacts with that market, although physically remote in a sense, were nonetheless continuous and substantial. 355 F.2d at 831-832.

Then, further reducing the term “transacts business” to “practical” and “everyday” language, the Court observed:

Had an officer of appellee suddenly been asked, in a non-legal context, “Are you doing any business in the District of Columbia,” his answer would, we surmise, have been “Yes.” His interrogator would understand him to mean that at least one customer in the District was looked to for an important amount of purchases; and, the more practical a man of business such an interrogator was, the more he would have assumed that appellee was in close and continuous touch with such customer about their mutual business concerns. This is what Congress had in mind when it pondered the problem of venue in relation to private antitrust suits, and decided to give the injured party wider scope to sue at home. See *United States v. Scophony Corp.*, *supra*. The exact limits of that scope may not be clearly fixed, but we think this appellee had, on the basis of the record before us, brought himself within them. 355 F.2d at 833.

The test then under *Semel* was not the manner in which defendant’s goods find their way to customers in the chosen forum but whether there is continuous flow of a

significant volume of goods into the forum—regardless of how they get there.

In the instant case, it is not necessary to go as far as did the *Semel* court. Our case is much more closely akin to *Brandt v. Renfield Importers, Ltd.*, 278 F.2d 904 (8th Cir. 1960). In that case a group of retail liquor dealers sued distillers, distributors, wholesalers and other retailers under the Sherman and Robinson-Patman Acts. The distiller defendants sought dismissal for lack of venue. The particularly applicable contentions of the parties re venue are set out in the opinion:

The appellants [plaintiffs] do not claim that the appellees have “agents” in Missouri directly carrying on the sale of appellees’ products but their claim is that when appellees’ business of selecting certain distributors in the district of suit and of selling their brands of liquor and causing them to be transported into the district to those distributors for distribution there is “judged in its totality” it must be concluded that they each do transact some substantial business in the district of suit. *Exhibitor’s Service v. Abbey Rents, D.C.*, 135 F.Supp. 112. They contend that each of the appellees is transacting business in the district in such a sense as to establish the venue of the suit there although not present by agents carrying on business in such character and in such manner that each appellee is found therein, or is there amenable to local process—because each in fact in the ordinary and usual business or commercial sense transacts business there of substantial character. *Eastman Kodak Co. v. Southern Photo Co.*, 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684. Appellants refer to the declaration of the Supreme Court concerning venue in antitrust cases in *United States v. Scophony Corporation*, 333

U.S. 795, 68 S.Ct. 855, 862, 92 L.Ed. 1091, that "the practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character' became the test of venue" and insist that the business of appellees fully meets that test. 278 F.2d at 909.

After noting that

The record does not include the contracts between appellees and their distributors, but it is evident that the relationships are close, intimate, and of long standing, and cover by expression or implication much more than mere isolated bargains of sale of such and such liquor at such and such a price,
(278 F.2d at 910)

the Court states and rejects defendants' position:

Appellees stress that their distributors are independent contractors and such they may appear to be in the technical common law sense. But they are not independent like a casual customer would be who occasionally makes a purchase from a vendor. On the contrary, they are selected sole and exclusive distributors who apparently perform for the appellees every function of distributing appellees' products that agents hired and paid for the purpose could accomplish.

* * *

We think that in everyday business conception the district of suit served with appellees' products as it is, would be sharply contrasted with a district where appellees' products were not for sale or obtainable and where appellees transacted no business. The relations of the appellees with their distributors is too close and continuous for all the transacting of

the business to be attributed in common understanding to the distributors and none to the appellees.

278 F.2d at 910.

* * *

The appellees describe their nationwide sales as made to wholesalers and distributors in the different states and press the doctrine of independent contractor to the point that it might be concluded that they do not transact business in any state except at their home offices. But we think that position is contrary to the teaching of *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684; (and other cases).

To the same effect see *Hartley & Parker, Inc. v. Florida Beverage Corporation*, 307 F.2d 916 (5th Cir. 1962), where the liquor distiller was not physically present in the District and its contacts were through wholesalers and goodwill visits and *Green v. U.S. Chewing Gum Mfg. Co.*, 224 F.2d 369 (5th Cir. 1955), where defendant was not physically present in the District but shipped goods into the District in response to mail orders.

In no case did any of these Courts of Appeals require a finding of agency between manufacturing-seller and its distributors. Indeed, they expressly found to the contrary. And it is quite interesting—perhaps amusing—that the *only* appellate court case cited by petitioner in support of its argument that sales through a distributor will not support venue against the manufacturer—*Sanders Associates, Inc. v. Galion Iron Works & Mfg. Co.*, 304 F.2d 915 (1st Cir. 1962)—is *not* an antitrust case and was therefore decided under the general venue statute applicable to diversity cases and as to which the powerful

policy arguments applicable to antitrust cases are wholly absent.

2. The District Court found no agency.

But Judge Pence found no agency relationship because none was required. What his analysis did show, however, was that the relationship between petitioner and its distributors was a close and intimate one and that PCF's Hawaii distributors, under the terms of their respective contracts, perform for PCF every function of distribution that hired agents or employees could have accomplished. (See *Brandt v. Renfield*, 278 F.2d at 910.) In so concluding, Judge Pence would have been warranted—on those facts alone—in holding the venue was appropriately laid in Hawaii because the relation of PCF with its distributors “was too close and continuous for all the transacting of business to be attributed in common understanding to the distributors and none to the [petitioners]”. 278 F.2d at 910.

3. Viewing the totality of the facts, petitioner was clearly within the forum.

But, as indicated above, Judge Pence looked to the totality of the facts. He found that in the 16-month period of time from March, 1964 through June, 1965 at least six trips were made by high echelon personnel of petitioner to Hawaii for the purpose of transacting business there. (R. 108.) And even petitioner's chief executive officer and board chairman admitted such business trips were made for goodwill or service and generally in response to distributors' requests. (R. 24.) Petitioner does not deny these trips. It just attempts to explain them away. It says

some were abortive (Petitioner's Memorandum, p. 22); but we know of no case that interprets "transacts business" to add the word "successfully". And petitioner says that the admitted trips to provide "assistance in our promotion of sales of Peterbilt trucks in the Hawaiian Islands" refers to distributors' sales, not its own. Can there be a difference?

And finally, there are two letters (R. 67-70) which clearly show that one of O'Neil's incorporators (Robert N. Larkin), then a resident of Hawaii, wrote to and received a reply from petitioner relating to the prospective Australian distributorship out of which this action arises. And two letters (R. 71-72) which show that Larkin, from Hawaii, communicated with his prospective business associates in Australia. Can it be seriously urged then that Hawaii was not *the* bridge between petitioner on the Mainland and respondent O'Neil in Australia and that Larkin's presence and activities in Hawaii brought the parties together to enter into the contract out of which the case arose.

The totality of these facts unquestionably then, supports the precise holding of the respondent Judge that petitioner "has carried on more than minimal business activities in the District of Hawaii" (R. 110) such that "this Court must find that defendant has been and is doing business in Hawaii within the purview of Clayton 12, and it is not unreasonable to compel the defendant to appear and answer in this forum". (R. 111.)

Were it otherwise, every manufacturer who transacts business through independent distributors and whose con-

tact with the forum is limited to goodwill and other legitimate business purpose trips could insulate itself from suit in any district where it does not have a plant or office. This result is so antithetical to the plain purpose of Section 12 of the Clayton Act, so inconsistent with the principles enunciated by this Court based upon earlier precedents of the Supreme Court, and so destructive of the utility of private antitrust cases as part of the enforcement program, that it should—now that the Court has decided to review this case by mandamus—be laid to rest finally and decisively. This Court has been presented with and has apparently accepted the opportunity to add its view to those of the Fifth, Eighth and District of Columbia Circuits, which now have virtually relegated the highly technical venue arguments to the scrap heap. Were this Court to take the present opportunity, it would, we submit, do much to discourage the wasteful and dilatory, and usually unsuccessful initial attacks on venue so frequently made in district courts.

Two “makeweight” arguments remain to be answered.

4. Petitioner’s analysis of the *Eastland* case is wrong.

First is petitioner’s contention that Judge Pence erred in considering evidence of petitioner’s activities prior to the time the cause of action arose. Petitioner argues that Judge Pence ignored the *Eastland Construction* case in considering events which occurred prior to the accrual of the cause of action.⁴ That argument might be tenable

⁴This is the first time we have seen the argument made that a Judge has “given little or no credit to the case” when he cites that case in support of a legal premise. (Petitioner’s Memo., p. 27) See footnote 8 of Judge Pence’s Opinion (R. 109).

if we were to excise footnote 10 of the *Eastland* opinion which in substance states that where a corporate defendant is at the time of filing of the complaint transacting business in the forum, then it is alternatively permissible to read 15 U.S.C. 22 in its literal present tense language. Thus the holding of *Eastland* was fashioned for and applicable to those situations envisioned by *Scophony* where the defendant has “retreated” or withdrawn after inflicting injury and before the complaint is filed. This conclusion is perfectly consistent with the articulate holding in *Eastland*, to wit:

“We conclude that the requirements of section 12 are satisfied if when the cause of action accrued the corporate defendant transacted business in the district in which suit is filed”. 358 F.2d at 782.

Nowhere does the opinion suggest that the present tense language *always* relates back to the time when the cause of action accrued.

5. Petitioner’s tortured reading of *Courtesy Chevrolet* is inconsistent with *Eastland* and the Supreme Court cases on which *Eastland* is based.

Finally, there is petitioner’s argument that because the alleged injury did not arise out of activities in Hawaii, venue cannot properly be laid in Hawaii. Stated more legalistically, petitioner contends that *Courtesy Chevrolet* necessarily incorporates the non-antitrust venue standards articulated by this Court in *L. C. Reeder Contractors of Arizona v. Higgins Industries, Inc.*, 265 F.2d 768 (9th Cir. 1958). This argument was made to and rejected by Judge Pence (who wrote the *Courtesy Chevrolet* opinion). Judge Pence pointed out that under Clayton 12 the cause

of action need not arise from activities within the forum and that this was so because venue standards under the antitrust laws were less stringent than in diversity cases (R. 109). Then Judge Pence observed that, although the *Reeder* standards were actually met in *Courtesy Chevrolet* (as a buttressing reason for reversal), *Courtesy* did not *require* that the *Reeder* standards be met.

Both observations are correct. This Court in *Eastland* made it clear beyond any question that Congress considered and rejected *limiting* venue in private antitrust actions to the place where the cause of action arises. This Court said of that proposal:

“Congress did not adopt the proposed amendments. Instead, Congress added the ‘transacts business’ language to section 12. The Supreme Court concluded that Congress intended the ‘place of injury’ basis for venue, which was tendered in the rejected amendments, to be encompassed within the ‘transacts business’ language which was adopted in their stead.” 358 F.2d at 781 (cited by Judge Pence for this proposition: R. 109).

See also *U. S. v. Scophony Corp.*, 333 U.S. 794 (1948), and *U. S. v. National City Lines*, 334 U.S. 573 (1948). Obviously then, “transacts business” means something broader than the place at which the injury is inflicted.

And a reading of *Courtesy Chevrolet* reveals that the finding of the *Reeder* standards there was not necessary to the result. Thus, footnote 9 of Judge Pence’s decision below states:

After the court had already determined that the acts of the defendant were sufficient to fulfill the venue requirements of Clayton § 12, it continued:

“Similar to the holding of this court in *Mechanical Contractors* [*supra*, 342 F.2d 393] we here *also* ‘think that the totality of the facts shown by this record satisfies the three tests laid down by us in *L.D. Reeder Contractors of Arizona v. Higgins Industries, Inc.*, 9 Cir., 1959, 265 F.2d 768, and *Kourkene v. American B. B. R. Inc.*, 9 Cir., 1963, 313 F.2d 769.’ ” (Emphasis added.) 344 F.2d 860, 866. (R. 110)

But even if we were to accept the notion that the cause of action must arise out of activities in the District in which it is brought, this case meets that standard. Judge Pence found on the basis of the letters referred to earlier (R. 67-72) that “the fundamentals of the distributorship contract of the parties out of which this action has arisen, were initially negotiated in Hawaii” (R. 110). That finding satisfies the second test of *Reeder* and brings this case within the even more stringent venue requirements governing non-antitrust cases.

For all of the reasons set forth above, this Court should deny mandamus as to the motions to dismiss and quash because venue was properly laid in Hawaii.

VII

RESPONDENT JUDGE PROPERLY EXERCISED HIS DISCRETION
IN DENYING THE TRANSFER MOTION**A. Applicable Legal Standards.**

A succinct statement of the law applicable to 28 U.S.C. 1404(a) transfer motions⁵ is found in *Texas Gulf Sulphur Company v. Ritter*, 371 F.2d 145 (10th Cir. 1967):

The transfer of pending civil cases from one district to another is governed by 28 U.S.C. § 1404(a) which provides “(a) for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” The burden of establishing that the suit should be transferred is upon the movant and unless the evidence and the circumstances of the case are strongly in favor of the transfer the plaintiff’s choice of forum should not be disturbed. The transfer lies within the sound judicial discretion of the trial judge and his determination should not be rejected unless the appellate court can say there has been a clear abuse of discretion. The circumstances of each particular case must be examined by the trial judge in the exercise of his discretionary power under section 1404(a) to order a transfer. Among the factors he should consider is the plaintiff’s choice of forum; the accessibility of witnesses and other sources of proof, including the availability of compulsory process to insure attendance of witnesses; the cost of making the necessary proof; questions as to the enforceability of a judgment if one is obtained; relative advantages and obstacles to a fair trial; difficulties that may arise from congested dockets; the possibility of the exist-

⁵We shall not discuss the transfer motion made under 28 U.S.C. 1406 which stands or falls on the propriety of venue in Hawaii.

ence of questions arising in the area of conflict of laws; the advantage of having a local court determine questions of local law; and, all other considerations of a practical nature that make a trial easy, expeditious and economical. 371 F.2d at 147.

The process of resolving a 1404(a) motion is “peculiarly one for the exercise of judgment by those in daily proximity to these delicate problems of trial litigation”. *Lykes Bros. Steamship Co. v. Sugarman*, 272 F.2d 679, 680 (2nd Cir. 1959). See also *Time, Inc. v. Manning*, 366 F.2d 690 (5th Cir. 1966).

The appropriate scope of review of this matter is whether or not the respondent Judge considered all of the relevant factors. If he “acted wisely and responsibly” (*Lykes Bros. Steamship Co. v. Sugarman, id.*), then this Court should deny mandamus.

B. The Respondent Judge Considered All of the Relevant Factors and Found That the Interest of Justice Would Not Be Served by Transfer.

Boiled down to its simplest form, petitioner’s argument for transfer is this: because O’Neil cannot bring this case in Australia, which is the place of the injury, and therefore must travel to the United States in any event, it should be required to bring the case at the place most convenient to petitioner. In short, foreign-based corporations should be required to sue American defendants at their headquarters office.

No case, no concept of law or equity, no principle of comity requires the American judiciary to so discriminate against a foreign-based plaintiff seeking relief under the American antitrust laws. And on the particular facts of

this case, Judge Pence was quite correct in saying that petitioner had failed to demonstrate that the interest of justice would be served by transfer to Seattle.

Petitioner submitted affidavits showing that 45 potential witnesses resided in the greater Seattle, Washington, area. All but two of these were past or present employees of petitioner. Petitioner also argued that eleven additional potential witnesses resided in or about the San Francisco Bay Area and that trial in Seattle would be more convenient for these persons than trial in Hawaii. Petitioner's brief listed the position each potential witness held with the company. Petitioner also advanced the other stock argument used to support transfer motions, namely, that its documents were located in Seattle and in the San Francisco Bay Area. Finally, petitioner computed—on the basis that all 56 Mainland witnesses would testify at trial—approximate travel costs to transport them to Hawaii.

O'Neil submitted affidavits showing (1) that all of its personnel resided in Australia and that travel to Seattle would be more costly to them and make more difficult "commuting" to and from trial which might otherwise be possible from Hawaii; (2) that there were potential witnesses in Hawaii including Al Gould the former officer of petitioner with whom O'Neil and Larkin negotiated their original Peterbilt distributorship arrangements and whose representations to the plaintiff at that time have become important evidence and (3) that plaintiff's choice of forum was not the result of "forum shopping" but was the American court nearest to its home so as to minimize costs.

Judge Pence weighed all the equities. His extensive experience in the pre-trial and trial of antitrust cases is known to this Court. He knew that substantially all of the potential witnesses listed by petitioner were its past and retired employees and hence subject to its control. Petitioner failed to show a single instance of a live witness who would be *unavailable* to it at trial if trial were in Hawaii; its showing was limited *solely* to convenience and cost. Moreover, must an experienced Judge blindly accept the representation that some 54 witnesses employed by a defendant will testify at trial when there is probably no antitrust case in history in which such a record has been established? Is a Judge to be impressed by problems of document transportation with knowledge, for example, of the document-handling procedures set up in electrical equipment conspiracy cases and established by this respondent Judge in the *Western Concrete and Steel Pipe Cases*? Is a judge to insulate himself from the realities of life—as, for example, evidenced by Pre-Trial Order No. 1—Exhibit A hereto? The questions are rhetorical.

And by saying that “at this stage of the litigation it is impossible for this Court to ascertain with any definitive approximation the burden which defendant may incur”, Judge Pence does not defer ruling; he states the obvious—that defendant’s wildly exaggerated showing provides him with no sound basis for judging the *actual* rather than the *highly problematical* hardship which defendant may sustain by trial in Hawaii.

Mere increase in the cost of defense has never justified transfer and petitioner cites no case for such a proposi-

tion. See, for example, *Golconda Mining Co. v. Herlands*, 365 F.2d 856 (2nd Cir. 1966). Were it otherwise, every antitrust case would automatically be transferred to the headquarters office of the corporate defendant where the bulk of its officers and records are maintained. 15 U.S.C. 22 would soon be hollow to fall before the massive showing possible in every case where the defendant is not sued in its home district.

Correctly pointing out that the burden for showing the interest of justice would be served by transfer is on the moving party, Judge Pence, after evaluating the facts before him concluded that petitioner has not met its burden. He met and discussed each point made by petitioner in its transfer motion. He correctly stated the applicable principles of law. He reached a result which was anything but arbitrary. If, on this record, this Court can conclude that there has been a usurpation of judicial power or an abuse of discretion, it will, we respectfully suggest, be establishing a wholly new and different standard applicable solely to foreign corporations.

Finally, petitioner makes much of O'Neil's "neutral ball park" argument. It ignores two facts. First that the plaintiff's choice of forum usually permits it to pick the district in which it is located. Thus, the law permits the plaintiff to select a forum for trial which is conceptually favorable to it, not neutral. Why, then, should petitioner be offended at having to litigate outside its home arena? This is the tradition in antitrust cases.

Secondly, the cases which petitioner cites re "neutral ground" are wholly inapplicable: *Paragon-Revolute Corp. v. C. F. Pease Co.*, 120 F.Supp 488 (Del. 1954); *Pepsi-Cola*

Co. v. Dr. Pepper Co., 214 F.Supp. 377 (W.D. Pa. 1963); *River Company, Inc. v. Texas Eastern Transmission Corp.*, 1954 Trade Cases ¶67,840 (S.D.N.Y. 1954); and *General Felt Products Co. v. Allen Industries*, 20 F.Supp. 491 (Del. 1954), cited by petitioner in its Memorandum (pp. 34-5) as rejecting the "neutral ground" forum, are all distinguishable. Each involved an American company which could have sued in its home district, but voluntarily chose to leave. This plaintiff *could not have sued in Australia because no court there has jurisdiction of a claim under the American antitrust laws*. A foreign-based plaintiff suing in the closest court to its home must, therefore, be treated as the equivalent of having sued in its home district. If any other rule is adopted, foreign corporations will necessarily find themselves in a position less favorable than their American-based counterparts. No rule of law or concept of equity justifies or requires such discriminatory treatment.

We respectfully submit that unless the Court is prepared to adopt a new, different and discriminatory standard applicable to foreign corporations, then it must deny mandamus as to the denial of the transfer motion.

VIII

CONCLUSION

For the foregoing reasons this Court should deny the prayed for writ of mandamus.

Dated, March 12, 1968.

JOSEPH L. ALIOTO,
MAXWELL M. BLECHER,
DAMON, SHIGEKANE & CHAR,
VERNON F. L. CHAR,

*Attorneys for Respondents L. C. O'Neil
Trucks Pty. Limited, Real Party in In-
terest, and by Special Designation for
Honorable Martin Pence, United States
District Judge, District of Hawaii.*

Of Counsel:

MARQUIS JACKSON.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MAXWELL M. BLECHER,
Attorney for said Respondents.

(Exhibits Follow)

Exhibits

Exhibit A

In the United States District Court
for the District of Hawaii

No. 2724

L. C. O'Neil Trucks Pty. Limited, (for-
merly Peterbilt (Aust.) Pty. Limited,
Plaintiff,

vs.

Pacific Car and Foundry Company,
Defendant.

PRE-TRIAL ORDER NO. 1

Plaintiff filed with its complaint a motion for the production of documents under Rule 34. It later filed a notice of taking certain depositions in Seattle on December 5-7, 1967. Defendant filed a motion to quash said notice, filed its own notice of taking depositions and filed its own motion for production under Rule 34. Defendant also filed a motion to quash return of summons, or in lieu thereof, to dismiss or transfer, pursuant to 28 U.S.C. §1406(a), or, if said motion be denied, for change of venue under 28 U.S.C. §1404(a), which motion was argued before the undersigned judge on October 23, 1967, and is still pending.

In view of the pendency of defendant's motion to dismiss or for change of venue aforesaid and in order to give counsel for the parties an opportunity to agree upon pending discovery matters, ruling on the various motions for discovery was reserved. Counsel have now conferred regarding said matters of discovery and their agreement is embodied in this order, which counsel have approved for entry. This order is without prejudice to defendant's pending motion to quash return of summons, etc.:

1. On or before December 5, 1967 at Seattle, Washington, or Newark, California, or both, as it may elect, defendant shall produce for inspection and/or copying the following documents called for in Appendix A of plaintiff's Motion to Produce, for the period from January 1, 1961 through and including April 30, 1967:

(a) Documents sufficient to show (preferably in diagrammatic form):

- (i) The corporate structure of PCF;
- (ii) The division structure of Peterbilt and Kenworth, and
- (iii) The relationship of the divisions to each other and to PCF.

(b) Such documents as will reflect for PCF, Peterbilt and Kenworth, separately, the names of persons having management authority and how such authority is divided functionally and/or geographically;

(c) All reports to stockholders, including interim and special reports;

(d) All memoranda and other documentation relating to, discussing, analyzing or commenting upon the construction of a truck manufacturing or assembling plant in Australia;

(e) All correspondence and contracts with plaintiff and all notes, memoranda, letters or other documents discussing plaintiff or memorializing oral conversations with or about plaintiff;

(f) All memoranda, correspondence or other documentation pertaining to the manufacture, assembly, or marketing of any trucks in Australia;

(g) All market studies, analyses, sales projections or similar documents regarding the manufacture, assembly or distribution of trucks in Australia;

(h) Books, documents or records sufficient to show the terms and conditions of sale by Kenworth to any of its distributors or dealers in Australia;

(i) Correspondence, bulletins, circulars, memoranda or other documents sufficient to show, with relationship to the marketing of trucks in Australia, (1) the general scope of authority of the officers of Peterbilt and Kenworth, (2) the general relationship, if any, of Peterbilt and Kenworth to each other in terms of engineering, manufacturing, sales, administration and finance, personnel, distributors and/or dealers, or any of these, (3) the general relationship of Peterbilt and Kenworth and their respective management to PCF with respect to engineering, manufacturing, sales, administration and finance, personnel, distributors and/or dealers, of any of these;

(j) All policy statements, letters of general distribution, bulletins, circulars, or the like, sent to (1) Peterbilt and (2) Kenworth distributors and/or dealers in Australia;

(k) Form of each distribution and dealers contract used in Australia by (1) Peterbilt and (2) Kenworth;

(l) All minutes or tape recordings of Peterbilt distributor meetings attended by a representative of plaintiff or to which plaintiff was invited;

(m) All general sales directives emanating from PCF to Kenworth and Peterbilt with respect to the marketing of trucks in Australia and all general sales directives from Kenworth and Peterbilt management to subordinate sales personnel, relating to the marketing of trucks in Australia.

2. On or before December 5, 1967, at the offices of its counsel, Joseph L. Alioto and Maxwell M. Blecher, 111 Sutter Street, San Francisco, California 94104, plaintiff shall produce for inspection and copying all of the documents called for by defendant's Motion to Produce except that the period covered by such production shall be from January 1, 1961 through and including April 30, 1967.

3. This order shall be without prejudice to the right of either party to seek production of those documents originally called for but not subject to production by this order and without prejudice to the right of either party to seek the production of other documents or to oppose and resist such further production requests by the other party.

4. On January 15, 1968 at 9:30 A.M. plaintiff will produce for deposition at 1610 Washington Building, Seattle, Washington, Laurence C. O'Neil and Richard Baker. Immediately upon the conclusion of the depositions of Messrs. O'Neil and Baker, or at 1:30 P.M. on January 17, 1968, if the depositions are not concluded at that time, defendant will produce for deposition at 1610 Washington Building, Seattle, Washington, Donald F. Pennell and Robert D. O'Brien. The depositions of Pennell and O'Brien shall continue until January 19, 1968 at 4:30 P.M.

It is agreed that the taking of the four depositions aforesaid in Seattle during the week of January 15, 1968 by the respective parties shall be without prejudice to the continuation of any of the said depositions upon reasonable notice.

Dated, December 6, 1967

Approved for entry:

Joseph L. Alioto

Maxwell M. Blecher

Vernon F. L. Char

/s/ Maxwell M. Blecher

Attorneys for Plaintiff

Helsell, Paul, Fetterman, Todd & Hokanson

Richard S. White

Roy A. Vitousek, Jr.

/s/ Richard S. White

Attorneys for Defendant

It is so ordered this day of December, 1967.

.....
United States District Judge

Exhibit B

[Title of Court and Cause]

**MEMORANDUM SUBMITTING PROPOSED
PRE-TRIAL ORDERS NOS. 2 AND 3**

Lodged herewith are proposed Pre-Trial Orders Nos. 2 and 3 each of which is largely self-explanatory.

The proposed Rule 37 motion referred to in Pre-Trial Order No. 3 deals with the subjects there indicated based upon the failure of Robert O'Brien, Chairman of the Board of defendant, acting upon the advice of counsel, to respond to questions in his deposition taken in Seattle on January 18-19. Because the transcript of that deposition has not yet been received, it is impossible to submit the motion at this time. Plaintiff will be prepared to do so very shortly after receipt of the transcript.

Taken together, Pre-Trial Orders Nos. 2 and 3 map out time sequences and orderly processes leading to the trial of the above case on December 5, 1968. We do not regard this as a "bargaining" proposal but think we have been extraordinarily liberal in having allowed for commitments of both plaintiff's and defendant's counsel in establishing this sequence of events which makes a December trial date feasible. In short, we regard this as a realistic and concrete proposal for the orderly disposition of this litigation and respectfully urge the Court to consider the advantages of now fixing such a trial date.

Dated:

Respectfully submitted,

Joseph L. Alioto,

Maxwell M. Blecher,

/s/ Maxwell M. Blecher,

Vernon F. L. Char,

Damon, Shigekane & Char,

Attorneys for Plaintiff.

[Title of Court and Cause]

PROPOSED PRE-TRIAL ORDER NO. 3

A pre-trial conference having been held on March 29, 1968, counsel having been heard and due deliberation having been had,

It is hereby ordered:

1. Unless the Court shall otherwise order, for good cause shown, all discovery in the above case shall be initiated not later than August 30, 1968;

2. (a) On or before September 30, 1968, plaintiff shall file a written trial brief containing separately numbered paragraphs and setting forth:

(i) The facts which plaintiff expects to prove in support of each claim for relief, distinguishing between those facts which plaintiff contends, on the basis of the answers, or otherwise, are admitted and those which are contested;

(ii) The legal issues, contentions, and supporting authorities related to each claim for relief, including plaintiff's contentions as to its theory and measure of damages pertaining to each claim and plaintiff's contentions as to the burden of proof on each issue. Plaintiff's contentions as to each plaintiff's theory and measure of damages should include a detailed narrative statement of all expert testimony plaintiff proposes to introduce at trial.

(b) On or before September 30, 1968, plaintiff shall designate those portions of any deposition which it expects to read into testimony at the trial and shall also designate those exhibits to the deposition on which it intends to rely or introduce into evidence at trial.

3. (a) On or before November 1, 1968, defendant shall file a written brief containing separately numbered paragraphs and setting forth:

(i) The facts which defendant expects to prove in defense of each claim for relief, distinguishing between those facts which defendant contends, on the basis of the complaint, plaintiff's brief or otherwise, are admitted and those which are contested;

(ii) The legal issues, contentions, and supporting authorities related to the defense of each claim for relief, including defendant's contentions as to the theory and measure of damages pertaining to each claim and defendant's contentions as to the burden of proof on each issue. Defendant's contentions as to plaintiff's theory and measure of damages should include a detailed narrative statement of all expert testimony defendant proposes to introduce at trial.

(b) On or before November 1, 1968, each defendant shall counter-designate those portions of any deposition which it expects to read into testimony at the trial and shall also counter-designate those exhibits to any deposition on which it intends to rely or introduce into evidence at the trial.

4. (a) On or before November 12, 1968, plaintiff may, if it desires, file a detailed written reply brief containing separately numbered paragraphs and setting forth:

(i) The facts, if any, plaintiff expects to prove in rebutting any affirmative matter raised by defendant in a brief filed pursuant to paragraph 3 hereof, distinguishing between those facts which plaintiff contends, on the basis of the answers, defendant's briefs

or otherwise, are admitted and those which are contested;

(ii) The legal issues, contentions and supporting authorities, if any, related to the rebuttal of any affirmative matter raised by defendant in a brief filed pursuant to paragraph 3 hereof, including plaintiff's contentions as to the party bearing the burden of proof on each issue.

(b) On or before November 12, 1968, plaintiff may, if it desires, designate those portions of any deposition which it expects to read into testimony at the trial and designate those exhibits to any deposition on which it intends to rely or introduce into evidence at the trial based upon the counter-designation by defendant.

5. Any factual issue, legal issue, contention, claim or defense not set forth in detail as provided in paragraphs 3 to 5 shall be deemed abandoned, uncontroverted, or withdrawn in further proceedings, the pleadings and other papers on file herein to the contrary notwithstanding, unless the Court shall otherwise authorize in the interest of justice; provided, however, that this exclusion shall not require detailed statements of witnesses' testimony and provided further that this exclusion shall not apply to evidence introduced by one party which is relevant to the testimony of a witness produced by the other party.

6. On or before November 15, 1968, each party shall designate all documents, graphs, charts or other exhibits on which it intends to rely or introduce at the trial.

7. On or before November 25, 1968 each party shall designate any additional documents, graphs, charts or

other exhibits on which they intend to rely or introduce into evidence at the trial in rebuttal of the documents designated in the preceding paragraph.

8. On or before November 15, 1968, plaintiff and defendant shall file:

- (a) Witness lists, indicating whether each witness will be presented by live or deposition testimony;
- (b) Proposed questions for the *voir dire* examination;
- (c) Draft of proposed instructions to the jury on the law of the case;
- (d) Proposed special interrogatories to the jury, if any;
- (e) Objections to said designated deposition testimony and/or exhibits;

9. A pre-trial conference is set for December 2, 1968 at which time final trial plans will be developed and a final pre-trial order formulated. Among other things, the following matters will be considered:

- (a) The *voir dire* examination;
- (b) Possibility of stipulating to facts;
- (c) The number of jury challenges permitted, the number of alternate jurors to be impaneled, and the necessity that a verdict be returned by a jury of twelve;
- (d) Jury instructions and special interrogatories;
- (e) The days and hours of the week during which Court will be conducted;
- (f) Rulings on any objections to designated deposition testimony and documentary evidence where possible.

10. Trial of the above case is set to commence on December 5, 1968 at 9:00 a.m.

Dated:

.....
United States District Judge

Approved as to form:

Maxwell M. Blecher

Attorney for Plaintiff

Richard White

Attorney for Defendant

[Title of Court and Cause]

PROPOSED PRE-TRIAL ORDER NO. 2

A pre-trial conference is hereby set for March 29, 1968 at a place to be fixed by the Court. At said pre-trial conference, the Court will hear argument on:

1. Plaintiff's proposed Rule 37 motion seeking a determination on:

- (a) defendant's claim of privilege and
- (b) defendant's refusal to furnish information respecting the payment of goodwill on the purchase of distributorships.

2. All objections to (a) motions to produce or (b) interrogatories outstanding as of said time.

3. Proposals regarding future scheduling.

Dated:

.....
United States District Judge

Exhibit C

[Title of Court and Cause]

**NOTICE OF MOTION TO PRODUCE UNDER RULE 34 OF
THE FEDERAL RULES OF CIVIL PROCEDURE**

*To: Pacific Car and Foundry Company and its counsel of
record:*

Please take notice that the undersigned attorneys for plaintiff will bring the attached motion for hearing before this Court on March 29, 1968 at 10:00 a.m. or as soon as counsel may be heard and at such place as the Court may designate, with respect to any matters of production sought.

Dated: January 23, 1968.

Joseph L. Alioto,
Maxwell M. Blecher,
/s/ Maxwell M. Blecher,
Vernon F. L. Char,
Damon, Shigekane & Char,
Attorneys for Plaintiff.

**PLAINTIFF'S MOTION TO PRODUCE UNDER RULE 34 OF
THE FEDERAL RULES OF CIVIL PROCEDURE**

Plaintiff hereby moves, pursuant to Rule 34 of the Federal Rules of Civil Procedure, for an order:

1. Requiring defendant to produce and permit the inspection and copying or photographing, by or on behalf of the plaintiff, of the documents listed in Appendix A of this motion, which documents are in the possession, custody and control of said defendant and contain and constitute evidence relevant and material to the matters and issues involved in this action as is more fully shown in the accompanying memorandum and affidavit of Maxwell M. Blecher.

2. Requiring that said documents be produced in the Seattle, Washington offices of defendant's counsel of record within twenty days after the entry of the order and from day to day thereafter.

3. This motion is based on the pleadings and files in this case and the memorandum in support of plaintiff's motion for the production of documents pursuant to Rule 34 and the affidavit of Maxwell M. Blecher.

Dated: January 23, 1968.

Joseph L. Alioto,
Maxwell M. Blecher,
/s/ Maxwell M. Blecher,
Vernon F. L. Char,
Damon, Shigekane & Char,
Attorneys for Plaintiff.

I

DEFINITION OF TERMS

As used in this Appendix, the following terms have the meanings indicated:

1. "Documents" refer to all written or graphic matter, however produced or reproduced, of every kind and description in the actual or constructive possession, custody, care or control of the addressee, including but not limited to originals (or copies where originals are unavailable) of: correspondence, telegrams, notes or sound recordings of any type of personal or telephone conversations or of meetings or conferences, minutes of directors' or committee meetings, memoranda, interoffice communications, reports, contracts, licenses, agreements, ledgers, books of account, vouchers, bank checks, invoices, charge slips, hotel charges, receipts, freight bills, working papers, statistical reports, cost sheets, stenographers' notebooks, desk calendars, appointment books, diaries, timesheets or logs, or papers pertaining to any of the foregoing however denominated by the addressee.

2. "PCF" means Pacific Car and Foundry.

3. "Heavy duty trucks" means off-highway as well as on-highway heavy duty vehicles.

4. "Plaintiff" as used herein means not only the named plaintiff but its predecessors and any of the officers, directors, agents or employees thereof purporting to act for them.

5. The period of time for which documents are requested unless otherwise stated extends from January 1, 1958, to date.

II

DESCRIPTION OF DOCUMENTS

1. All documents that evidence each acquisition made by PCF of any individual relating to the partnership or corporation engaged in the manufacture and/or assembling of heavy duty trucks or any component part used in manufacturing and/or assembling a heavy duty truck;

2. All documents discussing, analyzing, commenting upon, such acquisitions, including, but not limited to, any exchange of documents between the acquiring company and the acquired manufacturer and/or assembling plant;

3. All documents discussing the advantages or disadvantages of acquiring such manufacturing plant and/or assembling plant;

4. All documents showing the market value of the stock of each corporation manufacturing plant and/or assembly plant acquired by your company and the price you paid for such stock.

5. All documents relating to the establishment of Donald Pennell as Vice President in charge of co-ordinating the Kenworth and Peterbilt Divisions of PCF, including, but not limited to, documents discussing the reasons for establishing such an office, who made this decision, and what this officer's duties are.

6. All profit and loss statements of Kenworth and Peterbilt on a plant-by-plant basis. If such records are not kept on a plant-by-plant basis, then such profit and loss statements for the entire operations of both Kenworth and Peterbilt respectively.

7. All documents showing, or undertaking to show, or which discuss or relate to:

(a) Peterbilt's relative share of the heavy duty truck market

(i) domestically and (ii) internationally;

(b) Kenworth's relative share of its heavy duty truck market

(i) domestically and (ii) internationally;

(c) The total market share of both Peterbilt and Kenworth

(i) domestically and (ii) internationally

8. The capital budgets submitted by Peterbilt and Kenworth for the years 1958 through 1967, inclusive, and the action of PCF taken thereon.

9. All documents analyzing, commenting on or discussing, in whole or in part, the anticipated or actual construction by any of your company's competitors of a heavy duty truck plant on the west coast.

10. All documents, through 1967, relating, in whole or in part, to the establishment of a manufacturing plant and/or assembly plant in Australia, including, but not limited to, all documents submitted by any officer, director or other employee discussing the advantages or disadvantages of building such a plant in Australia and all documents showing the actual decision made concerning such plant and who made this decision.

11. All expense account vouchers and records of Robert O'Brien, Chairman of the Board of PCF.

12. All analyses or studies submitted to your company by the R. L. Polk Company.

13. All documents showing the payment for, commenting on, or discussing in whole or in part, the reason for paying for the goodwill or other intangible assets of any distributor of your trucks when such distributorship was purchased or sold by your company.

[Title of Court and Cause]

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF
MOTION TO PRODUCE**

I

STATEMENT OF THE CASE

On August 31, 1967, plaintiff L. C. O'Neil Trucks Pty., Ltd. (hereafter "O'Neil Trucks"), a cancelled distributor of heavy duty trucks, filed a complaint against Pacific Car and Foundry Company (hereafter "PCF"), plaintiff's former supplier. Plaintiff charged the defendant with participation in a combination and conspiracy in restraint of trade and attempt to monopolize in violation of Sections 1 and 2 of the Sherman Act. Concurrent with the filing of its complaint, plaintiff filed a Motion for the production of documents pursuant to Rule 34 of the Federal Rules of Civil Procedure. Defendant produced certain documents as designated in Pre-Trial Order No. 1 per agreement with plaintiff. On the basis of the documents produced and certain depositions taken, plaintiff seeks further document production.

II

APPLICABLE RULE AND PRECEDENTS

Rule 34 of the Federal Rules of Civil Procedure provides as follows:

“* * * Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the Court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody or control; or (a) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.”

Under Rule 34, the moving party is required to make a showing of “good cause.” This requirement is interpreted to mean that the Court must be satisfied that the production of the requested documents is necessary to enable the party to prepare his case, or that it will facilitate proof or progress at the trial. *Hickman v. Taylor*, 329 U.S. 495 (1947); *United States v. Five Cases*,

9 F.R.D. 81 (D.Conn. 1949), aff'd. 179 F.2d 519 (2 Cir.) cert. denied, 339 U.S. 963 (1950); *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958).

The scope of examination permitted under Rule 34 is as broad as the scope of inquiry by deposition under Rule 26(b) or by interrogatories pursuant to Rule 33. As is the case with all discovery rules, Rule 34 is to be liberally construed. *Hickman v. Taylor*, *supra*.

As pointed out hereafter, all documents requested either contain or constitute or are likely to lead to evidence relevant and material to the matters and issues herein or are relevant to the subject matter involved in this action. The requested documents therefore come within the scope of production permitted under Rule 34.

III

GOOD CAUSE EXISTS FOR THE PRODUCTION OF THE DOCUMENTS SOUGHT

Plaintiff has alleged, *inter alia*, that defendant has, in violation of Section 2 of the Sherman Act, combined and conspired to monopolize, unilaterally attempted to monopolize and actually monopolize the export of heavy duty trucks from the United States to Australia.¹

¹The combination charge rests alternatively, but not inconsistently, on (1) an *Hawaiian Oke* divisions conspiracy and (2) a PCF-Cameron conspiracy, either or both. We do not, however, disclaim the possibility of a PCF-competitor conspiracy. (See Paragraph 11 of the within motion.) The "attempt" charge renders the "division" theory moot. At the moment, little evidence is available to support the actual monopolization theory, which will probably be abandoned pre-trial.

Because we do not expect defendant to quarrel substantially with the *facts* (as distinguished from the inferences to be drawn therefrom) set forth hereinafter, we shall not—at this stage—undertake to document this recitation.

Both Kenworth and Peterbilt (the autonomous, competitive divisions of defendant PCF) manufacture at Seattle and Newark, California, respectively, diesel powered 33,000 lb. gross weight, heavy duty trucks. Kenworth entered the Australian market in 1962 by the appointment of Cameron as its exclusive distributor and shipped trucks to that country from its manufacturing facility in Seattle. In 1963 Peterbilt, without any prior export trade experience and never having produced a right-hand drive truck, undertook to enter the Australian market shipping trucks to that country from its Newark, California plant. No truck of the Peterbilt-Kenworth specification was then produced or even sold in Australia, though, of course, “heavy duty” trucks of inferior performance and lower price were available and sold to service the heavy duty truck market. While Mack and International Harvester assembled such trucks in Australia they were shipped in “knocked down” condition from manufacturing plants in the United States. Defendant recognized the competitive advantage of having a West Coast plant from which a truck manufacturer could ship to Australia. Defendant also recognized the vast potential market for its heavy duty truck in Australia. Finally, defendant recognized that the first American manufacturer who could economically justify a manufacturing—as opposed to assembly—facility in Australia would gain not only “a lion’s share

of the market” but could indeed cause importing competitors to “withdraw” from the market and “discourage entry” by others.

After Kenworth and Peterbilt competed, one against the other, for a period of two and a half years, each achieving results beyond the expectations of the defendant, a decision was made to discontinue importing Peterbilt into Australia in favor of building a Kenworth manufacturing facility in that country. Accordingly, plaintiff was “transferred” from its Peterbilt distributorship to a Kenworth distributorship. This decision was made knowing that the Australian Government was in the midst of an inquiry to adjust tariff rates on heavy duty trucks the result of which could have, and actually did, render the building of a plant in Australia economically unfeasible. After one year as a Kenworth distributor competing with the prior and still existing Kenworth distributor, defendant purchased the assets of Cameron, paying an amount over and above the asset value of good will, and proceeded to terminate plaintiff, thus leaving defendant with a “company branch” in Australia to reap double profits by plucking the fruit from the trees planted by the distributors.

All this sequence of events was preceded by the 1958 acquisition of Peterbilt Motor Company, an independent producer, by PCF which then operated Kenworth, which, according to the evidence, was then the largest selling truck in its class in the Western United States. Against this background and for the reasons briefly set forth below, each of the paragraphs of plaintiff’s motion calls for documents either evidentiary in themselves or likely to lead to the discovery of admissible evidence.

Paragraphs 1 and 2 of Part II of Appendix A (hereafter referred to only by paragraph) seek documents relating to acquisition by PCF of heavy duty truck manufacturing and/or assembling plants and acquisitions of plants that produce component parts for such trucks. Paragraph 3 seeks documents relating to the advantages and/or disadvantages of acquiring such plants. These documents, largely dealing with the Peterbilt acquisition by PCF, relate to the monopolization charge first on the West Coast, from which the expansion Westward originated.

Paragraph 4 seeks documents showing the value of any plant purchased by PCF and the price paid therefor. These documents, again really limited to the Peterbilt acquisitions, are relevant to the Sherman 2 allegations of the complaint especially where they seek to confirm rumors that the price paid by PCF far exceeded the value of the plant purchased.

Paragraph 5 seeks documents relating to the establishment of Donald Pennell as the Vice President in charge of co-ordinating the Kenworth and Peterbilt divisions of PCF. These documents are relevant on the "divisions" theory and also as general background.

Paragraph 6 seeks profit and loss statements of the truck divisions. These documents, showing profit rate and comparative profits, are relevant to the Sherman 2 allegations of the complaint and may help to explain the decisions re building of a Kenworth plant in Australia while Peterbilt expanded into the Eastern United States.

Paragraph 7 seeks documents showing the relative share of the heavy duty truck market held by the divi-

sions of PCF. These documents are very likely to contain or constitute admissible evidence on the Section 2 charge.

Paragraph 8 seeks the capital budgets submitted by the Peterbilt and Kenworth divisions of PCF and the action taken by PCF regarding such budgets. These documents are relevant on the "divisions" theory. They should also reveal profit objectives relevant to the Sherman 2 charge.

Paragraph 9 seeks documents relating to PCF's investigation into what plants its competitors were operating and planning to operate on the West Coast. This information is relevant on both the Sherman 1 and 2 allegations.

Paragraph 10 seeks documents post-plaintiff's termination relating to the establishment of a manufacturing plant in Australia. These documents should explain why the Kenworth plant was never built.

Paragraph 11 seeks the expense vouchers of Robert O'Brien. These documents are relevant to show where and with whom Mr. O'Brien has gone. This information is obviously relevant on the issue of conspiracy.

Paragraph 12 seeks the studies of R. L. Polk Co. These documents contain "market share" facts re heavy duty trucks in the United States and have obvious relevancy as with paragraph 7 documents.

Paragraph 13 seeks documents showing all payments made by PCF for good will when it purchased any distributorship of heavy duty trucks. Such information is relevant on the issue of damages and may also, as relates to Cameron, reflect a guilty state of mind.

IV

CONCLUSION

For the above reasons, plaintiff respectfully requests that this Court grant plaintiff's Motion in its entirety.

Dated: January 29, 1968.

Joseph L. Alioto,
Maxwell M. Blecher,
Francis O. Scarpulla,
By /s/ Maxwell M. Blecher,
Damon, Shigekane & Char,
By _____,
Attorneys for Plaintiff.

Of Counsel
Marquis Jackson
32-34 Bridge Street
Sydney, Australia

State of California
City and County of San Francisco—ss.

Affidavit of Maxwell M. Blecher in Support of
Motion to Produce Under Rule 34

Maxwell M. Blecher, being first duly sworn, deposes and says as follows:

1. That he is an attorney at law admitted to practice before all courts of the State of California and before this Court and is one of the attorneys for plaintiff in this case;

2. That the documents described in Appendix A are relevant and material to the issues in this case for the reasons set forth in the accompanying memorandum;

3. That the factual representations made in the accompanying Memorandum of Points and Authorities are true of my knowledge and belief and that memorandum is incorporated herein by reference.

4. That the pleadings, records and files in this action are incorporated herein by reference.

Dated: January 29, 1968.

/s/ Maxwell M. Blecher
Maxwell M. Blecher

Subscribed and sworn to before me this 29th day of January, 1968.

(Seal)

MARGARET ROGERS,
Notary Public in and for the City and
County of San Francisco, State of
California.

My Commission Expires April 23, 1969.

Exhibit D

[Title of Court and Cause]

**PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANT
SERVED BY PLAINTIFF PURSUANT TO RULE 33,
FEDERAL RULES OF CIVIL PROCEDURE**

*To: The defendant Pacific Car and Foundry Company
and its counsel of record.*

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, L. C. O'Neil Trucks Pty. Limited, plaintiff herein, hereby serves upon defendant the following interrogatories to be answered fully and separately in writing and under oath as provided in Rule 33.

1. List the name and address of each plant owned by your company that manufactures and/or assembles heavy duty trucks, stating as to each whether it is a manufacturing plant or an assembling plant, and the date on which your company acquired such operation.

2. List the name and address of each plant owned by your company that manufactures any component part used in manufacturing or assembling a heavy duty truck, and state the date on which your company acquired such operation.

3. For the period January 1, 1960-December 31, 1967 list the name and address of every wholly-owned Peterbilt or Kenworth distributor outlet operated by your company, the date on which such operation began doing business as your outlet, the date on which it ceased being operated as your wholly-owned outlet.

4. For each outlet listed in response to the preceding interrogatory, state the dollar amount, if any, separately allocated by you on the purchase or sale of any such outlet to "goodwill" or "going concern value" or any other similar but differently designated asset.

5. List the situs of every plant that manufactures and/or assembles heavy duty trucks which is: (a) presently in operation, and give the date that such plant began operating; (b) under construction, and give the date on which construction began; (c) proposed for future operation; (d) closed, and the date on which such plant closed.

6. For each plant indicated in answer to the preceding interrogatory, state: (a) the date on which the decision was made to begin assembling heavy duty trucks at that particular location and who made this decision; (b) the date on which the decision was made to begin building such plant and who made that decision; (c) the date on which the decision was made to investigate the possibility of assembling heavy duty trucks at the particular proposed situs and who made this decision; (d) the date on which the decision was made to close down each plant, and who made that decision.

7. List the author, addressee, date and subject matter of each document covered by Pre-Trial Order No. 1 the production of which was withheld by you under a claim of attorney-client privilege or attorney's work product.

8. For each year, separately, from 1958 through 1966, list each city in the United States in which (a) Peterbilt

had one or more distributors (b) Kenworth had one or more distributors.

Dated: January 26, 1968

Joseph L. Alioto,
Maxwell M. Blecher,
/s/ Maxwell M. Blecher,
Damon & Shigekane,
Vernon F. L. Char,
Attorneys for Plaintiff.

Exhibit E

[Title of Court and Cause]

NOTICE OF TAKING DEPOSITIONS

To: Defendant and its counsel of record:

Please take notice that counsel for plaintiff will take the depositions of the following officers at the times and places indicated:

| | |
|--|---------------|
| Al Gould | |
| Offices of Damon, Shigekane & Char | May 13, 1968 |
| 333 Queen St., Honolulu, Hawaii | 9:30 a.m. |
| R. E. McGilvra | |
| Office of Marquis Jackson | May 17, 1968* |
| 32-34 Bridge Street, Sydney, Australia | 9:30 a.m. |
| Ed Cameron | |
| Office of Marquis Jackson | May 17, 1968* |
| 32-34 Bridge Street, Sydney, Australia | 2:00 p.m. |
| Robert Larkin | |
| Offices of Richard White, Helsell, Paul, | June 6, 1968 |
| Fetterman, Todd & Hokhansen, | 9:30 a.m. |
| Washington Bldg., Seattle, Washington | |
| W. Gross | |
| Offices of Richard White, Helsell, Paul, | June 7, 1968 |
| Fetterman, Todd & Hokhansen, | 9:30 a.m. |
| Washington Bldg., Seattle, Washington | |
| J. Grant | |
| Offices of Richard White, Helsell, Paul, | June 7, 1968 |
| Fetterman, Todd & Hokhansen, | 1:30 p.m. |
| Washington Bldg., Seattle, Washington | |

*Australian date and time.

Said depositions will be upon oral examination pursuant to the provisions of the Federal Rules of Civil Pro-

xxx

cedure before a Notary Public or some other person duly authorized to administer oaths and take depositions. Said depositions will continue from day to day until completed. You are invited to attend and examine.

Dated: January 24, 1968.

Joseph L. Alioto,
Maxwell M. Blecher,
/s/ Maxwell M. Blecher,
Vernon F. L. Char,
Damon, Shigekane & Char,
Attorneys for Plaintiff.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC CAR AND FOUNDRY COMPANY,

Petitioner,

vs.

HONORABLE MARTIN PENCE, UNITED
STATES DISTRICT JUDGE, DISTRICT
OF HAWAII, and L. C. O'NEIL
TRUCKS PTY. LIMITED,

Respondents.

FILED

APR 1 1968

WM. B. LUCK, CLERK

PETITIONER'S REPLY BRIEF IN SUPPORT OF
PETITION FOR WRIT IN THE NATURE OF MANDAMUS

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ATTORNEYS FOR PETITIONER

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ATTORNEYS FOR PETITIONER

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UNITED STATES COURT OF APPEALS
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STATES DISTRICT JUDGE, DISTRICT)
OF HAWAII, and L. C. O'NEIL)
TRUCKS PTY. LIMITED,)
)
Respondents.)

No. 22565

PETITIONER'S REPLY BRIEF IN SUPPORT OF
PETITION FOR WRIT IN THE NATURE OF MANDAMUS

I. INTRODUCTORY NOTE

The order granting leave to file a petition for writ in the nature of mandamus provides for a brief in opposition (herein (Opp. Br.) and one in reply, in support of the petition. The comprehensive memorandum of facts and law we filed in support of our petition for leave to file is thus our principal brief. So that the court will have ample copies, we have provided the clerk with 17 additional copies of it.

For convenient reference, we have included in this brief as Appendix "A", a copy of the order from which the petition is taken (R. 106-13, reported as 1968 Trade Cases, §72,352).

II. CORRECTION OF O'NEIL'S FACTS

O'Neil's (respondents are herein referred to as "O'Neil") 'Statement of the Case' (Opp. Br. 1-3) recites only a few of the

facts (set out fully in our initial brief, pages 5-14) necessary to an understanding of this petition. O'Neil has added some "facts" in its brief which are not facts at all. The most glaring instance is on page 31 where O'Neil describes certain "affidavits" filed by it. In fact, O'Neil filed no affidavits showing "that all of its personnel resided in Australia" or showing "that plaintiff's choice of forum was not the result of 'forum shopping'". The only affidavits filed by O'Neil were one identifying certain correspondence (R. 60-83) and one naming six potential witnesses said to be residents of or "connected with" Hawaii (R. 84-87).

III. THE EXHIBITS TO O'NEIL'S BRIEF ARE NOT PROPERLY BEFORE THE COURT

O'Neil has appended to its brief various documents not before the respondent Judge when he passed on PCF's motion for dismissal or transfer. Indeed, only one, Exhibit "A", was ever presented to the Judge. These documents O'Neil has brought to this court "for such consideration as the Court may choose to give them." (Opp. Br. 3, fn. 1). We are not enlightened by O'Neil as to their purpose and doubt that they have any relevance. Assuming arguendo that they are properly before the court, a few comments are in order.

Exhibit "A", which was expressly "without prejudice to defendant's pending motion to quash return of summons, etc." (p. ii) is an order providing for certain preliminary discovery, including two depositions on each side (p. v). A remarkable feature of the deposition arrangements was that O'Neil served us as counsel for PCF with notice of taking depositions before we appeared in the case and before twenty (20) days had elapsed (Supp. R. 1-8). When our motion to strike the notice came on before Judge Pence,

he indicated, "that this Court would recognize that, technically, the motion to quash is well taken but, as a matter of fact, it would deny the motion." (Tr. 64, 67) (Italics added). The court urged us to work out a deposition schedule "to avoid the matter of making the decision it was about to make." (Tr. 67).

Faced with the certainty that our motion was about to be denied, we agreed to Pre-Trial Order No. 1. Our alternative was to afford O'Neil complete deposition priority, when, as the Judge observed, our motion to quash was "well taken".

The remaining documents O'Neil has appended to its brief are merely unilateral proposals by O'Neil served after Judge Pence's ruling on venue. None of them has been approved by us or by the court. We trust that the court will not be confused by the ending of Proposed Pre-Trial Order No. 3 which reads "Approved as to form ... Richard White, Attorney for Defendant." We have not approved or signed this order in any way, shape or form.

While we doubt that any of the exhibits to O'Neil's brief are relevant to the instant petition, this court may be interested to know that O'Neil's primary theory of the case is "an Hawaiian Oke divisions conspiracy ..." (p. xix, fn. 1).

This reference is to Hawaiian Oke & Liquors Ltd. v. Joseph E. Seagram and Sons, 1967 Trade Cases §72,186, wherein Judge Pence, at the behest of O'Neil's counsel, held, in a case of "first impression", that unincorporated divisions of a single corporation (such as petitioner's Peterbilt and Kenworth divisions) could conspire with each other in violation of the Sherman Act.

IV. ISSUES PRESENTED

O'Neil has restated the three questions which we summarized (p. 1-5) and argued (p. 14-40) in our initial brief. These three

questions, which we will treat in order, are the appropriateness of mandamus, whether petitioner transacts business in Hawaii under Section 12 of the Clayton Act, and whether the action should be transferred under 28 U.S.C. §1404(a).

V. ARGUMENT

A. Mandamus Is An Appropriate Remedy - O'Neil Is Mistaken In Stating That Denial of the Motion "Rests Upon Factual Determinations"

O'Neil concedes that mandamus is a proper remedy to review orders of the type entered below (Opp. Br. 10) but argues that it is inappropriate because the order here "rests upon factual determinations." (Opp. Br. 7). At the same time O'Neil twice asserts that the record presents "essentially uncontroverted facts."* (Opp. Br. 11, 17).

Rather than resting on "factual determinations", in the traditional sense of the resolution of disputed facts, the finding below that PCF transacts business in Hawaii is a conclusion based on a misreading and misinterpretation of uncontroverted facts. In ruling on our 1404(a) motion, the Judge made no findings whatsoever as to relative convenience but failed to exercise his discretion employing the standards prescribed by the statute, or, for that matter, at all.

The appropriateness, indeed the compelling need, for mandamus is demonstrated by the authorities cited by us at pages 36 - 40 of our initial brief. Also see ACF Industries, Inc. v. Honorable Ernest Guinn, 384 F.2d 15, 20 (5th Cir. 1967).

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*In its Memorandum ... In Opposition to Petition For Leave To File Writ of Mandamus, O'Neil prefaced its review of the District Judge's findings as follows: "In his Opinion, the Respondent Judge found on the basis of admittedly undisputed facts..." (p. 2).

B. Petitioner Does Not Transact Business
In Hawaii Within The Meaning of Section
12 of the Clayton Act (15 U.S.C. §22)

O'Neil's argument (Opp. Br. 10-12, 15-28) in support of the District Court's conclusion that PCF transacts business in Hawaii is long on generalities and short on any close analysis as to whether the ultimate conclusion is warranted by the facts. We can all agree that "Section 12 of the Clayton Act Must Be Liberally Construed" (p. 15-17) and that the facts should be viewed in their "totality" (p. 23). These generalizations are, however, no substitute for a hard look at the record to determine whether the District Judge's conclusions* are supported by the record.

O'Neil has painstakingly pasted together excerpts from opinions which are designed to leave the impression that sale of products through a local distributor in a particular jurisdiction per se makes the manufacturer subject to jurisdiction in that district under Section 12 of the Clayton Act. We have found no case so holding. O'Neil has cited none. The crucial question is always, where jurisdiction is based primarily on the manufacturer-distributor relationship, whether the manufacturer retains such controls that in a practical sense it transacts business through the agency of its distributors. The District Judge understood that the test was one of control. He misread the distributor's contracts to find "a tight control". (App. "A", p. 84,955). In contrast to B. J. Semel Assoc. Inc. v. United Fireworks Mfg. Co., 355 F.2d 827 (D.C. Cir. 1965), a 2-1 decision relied upon by O'Neil, petitioner maintains no control over the financial or other

*As if to put the order out of sight and, therefore, out of mind, O'Neil, instead of printing the order which is all important, chose to append 30 pages of improper and irrelevant material to its brief.

operations of its Hawaiian distributors. In the Semel case the manufacturer dipped far into the distributor's "relations with its own customers -- a circumstance of active interest to appellee [manufacturer] because of its practice of requiring assignment to it of appellant's [distributor's] receivables."

In L. D. Reeder Contractors of Ariz. v. Higgins Industries, 265 F.2d 768, 774 (1959) this court noted, in a context of discussing constitutionally minimum contacts:

"Higgins did correspond with its factory representatives and distributors who purchased Higgins' products and resold them. The factory representatives were independent contractors and not servants or agents. They set their own ultimate prices for the Higgins products."

O'Neil argues that Reeder did not arise under the antitrust laws; hence it cannot apply here (Opp. Br. 26-28). However, we doubt that Section 12 of the Clayton Act can be read as liberalizing venue standards beyond what are found to be irreducible constitutional minimums in non-antitrust matters.

The argument that degree of control or commonlaw principles of agency are immaterial overlooks the many cases in this field, in which courts have held that presence of a subsidiary of the defendant acting as a distributor in the forum district is insufficient to satisfy jurisdiction over a parent under Section 12, unless the parent company exercises control over the day-to-day operations of the resident corporation. The point may be illustrated by the cases cited in our initial brief (p. 18) and by Global Pub. Corp. v. Grolier, Inc., 273 F. Supp. 637, 638 (D. Mass. 1967). That was a Sherman Act case in which the issue was whether venue was properly established against a publisher through its subsidiaries in the forum. The District Judge found:

"It [plaintiff] has not, however, succeeded in making a showing that these [subsidiary] corporations are dummies for or alter egos of Grolier. It has not shown an agency relationship."

The crucial nature of "control" in the practical solution of antitrust problems is also demonstrated in the Respondent Judge's opinion in Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram and Sons, Inc., 1967 Trade Cases, §72,186* wherein the question was whether competing divisions of the same company could conspire with each other in violation of the Sherman Act. After noting that the case was one of "first impression" (p. 84, 259) and answering the basic question in the affirmative, Judge Pence declared the test of capability to conspire:

"Thus, whether a division is capable of conspiring depends on the peculiar facts demonstrated. Is each facet of the unincorporated division's operation in fact, for all purposes, controlled and directed from above, or is it endowed with separable, self-generated and moving power to act in the pertinent area of economic activity? This is the key question. If the division operates independently in directing the relevant business activity, then it is a separate business entity under the antitrust laws." (p. 84, 261).

We are moved to ask: If a division which is legally a part of a corporation "is a separate business entity under the antitrust laws" when it "operates independently in directing the relevant business activity" why then wouldn't a distributor which is a distinct legal entity be regarded as "a separate business entity under the antitrust laws" when it operates "independently in directing the relevant business activity?"

*This case of "first impression" is the holding upon which O'Neil relies for his primary theory of the case against petitioner (Opp. Br., Ex. C, p. XIX, fn. 1).

Finally, O'Neil's strong reliance upon Brandt v. Renfield Importers, Ltd., 278 F.2d 904 (8th Cir. 1960) is misplaced (Opp. Br. 20, 23). In that case the manufacturer had taken out licenses from the State of Missouri and had, therefore, availed itself of important privileges conferred by the State. This court most recently recognized the significance of this factor in Taylor v. Portland Paramount Corp., 383 F.2d 634, 642 (1967) when it said:

"We cannot find that Taylor, as distinguished from Fox, has done any act by which she purposefully availed herself of the privilege of conducting activities within Oregon, thus invoking the benefits and protection of its laws."

Beyond the maintenance of business relationships with independent distributors in Hawaii, O'Neil cites visits by PCF personnel to the distributors as contributing to a "totality" of contacts which should make it reasonable for petitioner to defend itself in Hawaii. We have already dealt with these visits in our initial brief, pages 21-23. O'Neil now strains hard to maximize these contacts. Just how hard is shown by its statistic that "at least six trips were made by high echelon personnel of petitioner to Hawaii for the purpose of transacting business there." (Opp. Br. 23). Sole support for two of the "trips" is the following paragraph from a letter by Pennell of PCF to O'Neil of June 21, 1965:

"Jim Luce, our General Sales Manager, and I are leaving for Australia on Sunday morning, June 27. We will visit briefly with Al Gould in Honolulu, and leave at midnight on PanAm. Flight #811, due to arrive in Sydney at 8:35 A.M., on Tuesday, June 29." (R. 82).

Pennell's letter goes on to say that he and Luce plan to spend two weeks in Australia. In a comparable situation, this court gave little weight to conferences in California held by officials of a Louisiana manufacturer, which were incidental to their "passing

through California, on their way to or from Hawaii." (L. D. Reeder Contractors of Ariz. v. Higgins Industries, 265 F.2d 768, 774).

O'Neil argues further that venue is proper because "Hawaii was ... the bridge between petitioner on the Mainland and respondent O'Neil in Australia." (Opp. Br. 24). This beguiling suggestion is not supported by the facts. It is based on an erroneous finding by the District Judge who stated in his opinion:

"Plaintiff's American promoter was a resident of Hawaii at the time he entered into negotiations and had discussions and visits in and out of Honolulu with the representatives of Peterbilt concerning its subsequent contract with plaintiff." (App. "A", p. 84,954).

None of the four letters cited by the Judge indicates any negotiation with PCF in Honolulu concerning a possible Peterbilt franchise.

The initial contact between the parties was made by Robert Larkin, later half owner of O'Neil, in Newark, California and Seattle, Washington, in January-February, 1963. (See R. 93-94). The actual negotiations occurred after Mr. Gould, then Peterbilt sales manager, went to Australia in April to investigate the feasibility of establishing a Peterbilt dealer there. (See R. 95-96, R. 102-05). It was only on May 10, 1963 after Gould's return that Larkin wrote the proposals to Peterbilt which ultimately led to the agreement of July 1, 1963 (R. 6). There were no discussions or meetings of any kind between representatives of the parties in Hawaii at any time, either before or after the distributorship agreement was signed (R. 98).

We pointed out in our initial brief (p. 26-27) that these activities, which antedated not only possible accrual of the action but the birth of the O'Neil firm, were irrelevant. Eastland Con-

struction Co. v. Keasbey & Mattison Co., 358 F.2d 777, 780 (9th Cir. 1966) holds that in determining whether a defendant transacts business in a given jurisdiction for purposes of Section 12, one looks back to the date when the action accrues. As this court observed in Dragor Shipping Corp. v. Union Tank Car Co., 361 F.2d 43, 48 (1966), where in a contract case "the only issues presented relate to its breach and not its validity, we think the antecedent dealings are without constitutional significance and do not provide the necessary substantial connection."

Viewed from a purely practical standpoint, these earlier dealings have no present impact. Robert Larkin, whose Hawaiian residency provided the so-called bridge, moved to Australia in mid-March of 1963, four months before the distributor's contract was signed (R. 72, 73) and now lives at 182 Encinal Avenue, Atherton, California (R. 30). James Moir, the only other possible Hawaiian contact, who was in March, 1963 president of Moir Industries, Inc., then a Hawaiian distributor for Peterbilt (R. 64, 77-78), moved from Honolulu to Manila in January, 1964, and has lived there ever since (R. 88-90).

C. Neither Precedent Nor Logic Sustains Respondents' View That Antitrust Cases Are Exempt From The Second Reeder Requirement

O'Neil concedes that the non-antitrust venue standards articulated by this court in L. C. Reeder Contractors of Arizona v. Higgins Industries, Inc., 265 F.2d 768 (9th Cir. 1958) require that the alleged injury arise out of activities in the forum district (Opp. Br. 26). O'Neil argues, however, that this is not a required standard in antitrust cases, and would dismiss as dictum the application of the standard by this court in Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders Assn., 344 F.2d 860 (9th Cir. 1965)

(Opp. Br. 27-28). In this, counsel merely repeats the District Judge's statement (App. "A", p. 84,954) without examining its soundness. We have already explained the reasons why we believe the respondents' position to be incorrect (Initial Br. 23-26). This court, in its most recent review of the legislative and judicial history of Section 12, referred to "... Congress's purpose of enabling the injured person to sue in the district where the injury occurred..." Eastland Construction Co. v. Keasbey & Mattison Co., 358 F.2d 777, 782, fn. 11). The second requirement of Reeder (265 F.2d 768, 773-74, fn. 12), that the cause of action arise from the defendant's activities in the forum, was very much in the minds of the advocates of Section 12. In United States v. National City Lines, 334 U.S. 573, 583 (1947), the Court said of those who favored enactment of Section 12:

"The basic aim of the advocates of change was to give the plaintiff the right to bring suit and have it tried in the district where the defendant had committed violations of the Act and inflicted the forbidden injuries."

This statement is supported in a footnote which quotes one proponent as saying, "The philosophy of legislation with regard to this subject should give the venue at the place wherein the cause of action arises." (p. 583, fn. 20).

We respectfully disagree with respondents that the Reeder requirements were applied in Courtesy, a Section 12 case, through some sort of judicial inadvertence (See Initial Br. 25-26). We note that in its latest approval of the Reeder standards, in a diversity case, Taylor v. Portland Paramount Corp., 383 F.2d 634, 641 (1967), this court cited Courtesy in support, along with several cases from other fields of law.

But whether or not the Reeder requirements were meant to be applied to antitrust in Courtesy, why shouldn't these standards which this court has repeatedly called constitutional minimums, be so applied?* Is a man sued under the antitrust laws not entitled to the protection of the Constitution? Granted that the antitrust venue requirements are to be liberally applied, we doubt that the Constitution can be bent specially for antitrust cases.

O'Neil sidesteps the question whether some connection between the forum and the defendant's activities there is a necessary constitutional requirement. It argues circularly that the only relevant inquiry is whether "a constitutionally required minimal contact is found in any given case." (Opp. Br. 11) and that, therefore, it is quite irrelevant to ask whether a defendant, as contrasted with its independent distributor, transacts business in the forum (Opp. Br. 12, 24-25). It thus neatly avoids the real question - whether the constitutionally required minimum contacts are satisfied by activities of a wholly independent distributor. The burden of proving jurisdiction is, after all, upon the plaintiff, when its allegations are challenged. Taylor v. Portland Paramount Corp., 383 F.2d 634, 639 (1967); United Industrial Corp. v. Nuclear Corp. of America, 237 F. Supp. 971, 979 (D. Del. 1964) and cases cited. This burden was not met. Instead, the record shows that petitioner's contacts with Hawaii were insufficient to support a conclusion that it transacted business there.

*Most recently in Taylor v. Portland Paramount Corp., 383 F.2d 634, 641 (1967). Other courts have expressed similar views. As noted in Bullard v. Rhodes Pharmacal Co., Inc., 263 F. Supp. 79, 82-83, fn. 10 (D. Mont. 1967), the Eighth Circuit has adopted standards essentially the same as were enunciated in Reeder.

D. Instead of Exercising His Discretion, Applying
the Criteria Prescribed by Section 1404(a),
the District Judge in Effect Tabled Our Motion

The District Judge held that "at this stage of the litigation it is impossible for this court to ascertain ... the burden which defendant may incur." (App. "A", p. 84,956).

Neither respondent tells us just when the time would be ripe for a 1404(a) motion. Plainly, if a defendant does not make the motion at the threshold he risks a charge of waiver. Equally obvious is the difficulty of renewing the motion at a later time. Then plaintiff would argue how wasteful it would be for another judge to become familiar with the case.

What can be learned between now and eve of trial? Petitioner's 56 potential witnesses are not going to move to Hawaii. Petitioner is not going to move its files to Hawaii unless compelled to do so by the prospect of a trial there. The Hawaiian Islands are not going to move any closer to the mainland. The exact list of trial witnesses will not be known until the final pre-trial order is settled, on the eve of trial. We doubt the practicality of our renewing our motion at that time, when calendars are committed and the expenses we seek to avoid have been largely incurred. We believe it too plain for argument that Congress intended 1404(a) motions to be tested against the showing made by the parties at or close to the outset of the litigation. Viewed in this light, the District Judge's action on our motion was tantamount to employing the parliamentary technique of tabling, instead of ruling on our motion.

Aided by what O'Neil boasts is a complaint "with an unusual degree of specificity for an antitrust case" (Opp. Br. 2) and O'Neil's unusually thorough motion for production of documents, filed with

the complaint (R. 14-22), petitioner was able to estimate its probable burdens and expenses with unusual definiteness (R. 25-34, also see Initial Br. 12-14, 29).

Contrary to O'Neil's brief (Opp. Br. 31) it made no showing whatsoever of any inconvenience or expense to it of trying the case in Seattle, instead of Honolulu. It did not identify a single potential witness from Australia or a single document which was located there. In similar circumstances Chief Judge Leahy said in General Felt Products Co. v. Allen Industries, 120 F. Supp. 491, 493 (D. Del. 1954):

"Plaintiff stands pat on its selection of forum.... If plaintiff chooses to stand mute, making no profer of his conveniences, or the justice impact on him, he assumes the risk of defendant's overcoming counter-choice of forum by a favorable balance of §1404(a)'s factors."

Also see Taylor v. Portland Paramount Corp., 383 F.2d 634, 639 (9th Cir. 1967).

O'Neil now seeks to justify deferral by the District Judge of the motion to transfer, on the ground that the wisdom and experience of the Judge in antitrust matters was such that he intuitively disbelieved petitioner's showing of burdens and expense (Opp. Br. 15, 32). It is true that the District Judge for all practical purposes ignored our affidavits. He certainly did not weigh all the equities or evaluate all the facts, as required by 1404(a). However, the suggestion that the District Judge disregarded petitioner's affidavits as to witnesses, documents and expenses because he disbelieved them, is solely O'Neil's invention. The Judge did not express any doubts as to the statements made, and certainly would have had no reason to do so. Since most of the witnesses listed

by petitioner had had direct contact with respondent, O'Neil undoubtedly could verify or impeach the statements by knowledge of people in its own organization. That it chose not to file any counter-affidavits or test any of the statements by discovery furnishes persuasive support for the integrity of petitioner's sworn showing.

O'Neil's statement that our claims of probable hardship and expense are "wildly exaggerated" (Opp. Br. 32) is a strange inverted argument which says much for how totally one sided the showing of inconvenience is. What O'Neil fails to understand is that whether only 53 or 33 of the 56 witnesses listed in Mr. O'Brien's affidavit are ultimately trial witnesses is beside the point. The point is that the vast majority of trial witnesses will be from the Western District of Washington and the vast majority of the documents which will be needed are located there. O'Neil belittles the burden and expense of defending an \$8,250,000 antitrust action (Opp. Br. 32). It claims that there is no precedent in antitrust history for the burdens and expense which petitioner estimates it may incur (Opp. Br. 32). While we do not claim any direct parallel with any previous antitrust action, we invite the court's attention to one case, among many cited by Judge Yankwich in "'Short Cuts' in Long Cases", 13 F.R.D. 41, 63-64 (1953), where there were 27,000 exhibits and 70,000 pages of record. O'Neil argues against itself when it refers to the techniques used to scale down the costs and inconvenience of the "big" antitrust case. If Section 1404(a) is not to be applied in big antitrust cases, where the costs and expenses are so notorious that special techniques and handling are necessary, what is it for? It is certainly no answer to tell a

defendant, as the District Judge did here, that his unopposed affidavits are insufficient because his 56 witnesses can be deposed and his 1,000 or more file drawers of records (R. 32-33) can be copied by "modern document duplicating equipment." (R. 112). Yet, that is what the Judge held (App. "A", p. 84,956). And now, O'Neil tells us that our showing is insufficient because maybe the 56 witnesses can come to Honolulu for the trial and "Mere increase in the cost of defense has never justified transfer ..." (Opp. Br. 32). We are, therefore, given two separate rationalizations of non-transfer. The Judge says we are not hurt because we can take depositions, which we pointed out, citing cases, are regarded as poor, inflexible substitutes for live testimony (Initial Br. 32-33). O'Neil says we can bring the witnesses to Honolulu for trial. If cost of defense and inconvenience are not proper criteria for weighing motions under 1404(a) we wonder what the proper tests are. In fact, O'Neil refers disparagingly to our showing of costs and inconvenience as "stock arguments." (Opp. Br. 31). We concede that the criteria we asked the District Judge to apply are commonplace. That is doubtless because they happen to be the standards prescribed by Congress -- "For the convenience of parties and witnesses in the interest of justice."

O'Neil has said not a word in support of the District Judge's generalization that, "the plaintiff's choice of forum should not be lightly set aside" (App. "A", p. 84,955). As we pointed out (Initial Br. 30-32), plaintiff's choice of forum is entitled to little or no consideration where plaintiff is a nonresident of the forum and the cause of action has little or no connection with the defendant's contacts there.

O'Neil's principal argument in opposition to our motion under §1404(a) is a plea that the statute should not apply against foreign-based aliens, since they have no home district in America in which to bring suit (Opp. Br. 30-34). Congress did not see fit to exempt such parties from §1404(a). We must, therefore, assume that foreign-based plaintiffs are subject to the same rules of transfer as American companies.*

O'Neil argues that application to it or any other foreign-based plaintiff of §1404(a) would force "foreign-based corporations ... to sue American defendants at their headquarters office." (Opp. Br. 30). O'Neil's counsel forgets his own statement to Judge Pence that his client could have sued PCF in the Northern District of California, where Peterbilt has its headquarters; in Missouri, where Kenworth has a factory, or elsewhere (Tr. 40). Of course, such actions would be subject to transfer under §1404(a). However, it takes little imagination to think of a variety of possible circumstances where the balance of convenience might not favor transfer to the headquarters district of the defendant. Many foreign firms have American bases. Many causes which might accrue to foreign companies would heavily involve witnesses in districts other than the defendant's headquarters. In fact, O'Neil's contract, sued on here, was with a division of petitioner which is located at Newark, California, a few miles from the offices of O'Neil's counsel. O'Neil's argument that it would be discriminated against if §1404(a) were applied to its action is absurd on its face.

*It is the rule in most types of cases, including those based on diversity of citizenship, that an alien may bring his action only in the district where the defendant resides. 1 Moore's Fed. Prac. (2nd ed. 1964) 1510-11, ¶0.142[6].

Its contention that it could only sue at petitioner's headquarters is disproved by the statements of its own counsel (Tr. 39-40).

Implicit in all of O'Neil's arguments on this point is the contention that it is entitled to have its case heard, irrespective of §1404(a), in a neutral ballpark. This argument is fully answered by the established rules that neutrality of forum is not a relevant consideration under §1404(a) (See our Reply Brief in Support of Petition For Leave to File, etc., p. 6) and that if at least one party has to travel, there is no sense in making the trial as equally inconvenient as possible for both parties (Initial Br. 34-36).

VI. CONCLUSION

Issuance of a writ in the nature of mandamus is the only remedy available to correct the erroneous denial of petitioner's motion. As the Fourth Circuit put it:

"It is obvious that if we postpone action until appeal after final judgment, the question will have become moot and the damage done....." General Tire & Rubber Company v. Watkins, 373 F.2d 361, 370 (4th Cir. 1967).

Petitioner cannot be said to transact business in Hawaii. Its contacts with that state are all with independent distributors over whom it exercises no control.

If the undisputed facts on which the motion under §1404(a) was decided are insufficient to compel transfer, it is hard to think what purpose the statute serves. The showing is overwhelming that the vast majority of trial witnesses will be from the Western District of Washington and the vast majority of the documents which will be needed are located there. The District Judge never faced and decided our motion, rather he deferred considera-

tion of the merits until the burdens and expenses would actually be incurred.

For the reasons cited herein, in our initial brief and in our "Petition For Writ of Mandamus", a writ in the nature of mandamus should issue, as prayed for in our petition (p. 9).

Respectfully submitted,

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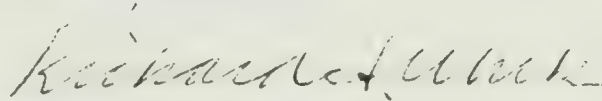


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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A handwritten signature in cursive script, appearing to read "Richard S. White".

RICHARD S. WHITE

Attorney for Petitioner

[¶ 72,352] *L. C. O'Neil Trucks Pty. Limited (formerly Peterbilt (Aust.) Pty. Limited) v. Pacific Car and Foundry Co.*

In the United States District Court for the District of Hawaii. Civil No. 2724. December 22, 1967.

Clayton Act

Venue—Comparative Burden—Availability of Duplicating Techniques.—A Washington corporation, sued in Hawaii for treble damages by an Australian firm, was denied its request that the return of summons be quashed, that venue be transferred or dismissed under 28 U. S. C. 1404(a), or that venue be transferred under 28 U. S. C. 1404(a), since it was not possible at this stage of the litigation to definitively ascertain the burden which the defendant may incur. The availability of modern document duplicating equipment and depositions would greatly reduce the firm's cost and inconvenience in conducting the litigation in Hawaii, while transfer would further burden the Australian firm which had selected the American forum closest to its home. In the present posture of the case, it was not in the interest of justice to transfer the action. The court had found that the Washington firm had distributor contracts, dealings and control in Hawaii. Venue cases in diversity actions, relied upon by the firm, set more stringent standards than are required under the Clayton Act, Sec. 12.

See Private Suits, Vol. 2, ¶ 9092.

For the plaintiff: Vernon F. L. Char of Damon & Shigekane, Honolulu, Hawaii; Marcus Jackson, Sydney, Australia; Maxwell M. Blecher, San Francisco, Cal.

For the defendant: Roy A. Vitousek, Honolulu, Hawaii; Paul Fetterman and Richard S. White of Helsell, Paul, Fetterman, Todd & Hokanson, Seattle, Washington.

Order Denying Defendant's Motions to Quash Return of Summons, To Dismiss or Transfer Pursuant to 28 U. S. C. 1406(a), and for Change of Venue Under 28 U. S. C. 1404(a)

PENCE, D. J.: Plaintiff L. C. O'Neil Trucks Pty. Limited, of Australia, seeking treble damages from defendant Pacific Car and Foundry Company, of the United States, for alleged violations of Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, filed its action in the District of Hawaii, pursuant to Section 12 of the Clayton Act.¹

Pacific Car has moved this court (1) to quash return of summons and dismiss this action, or transfer it to the United States District Court for the Western District of Washington, Northern Division, pursuant to 28 U. S. C. 1406(a), or (2) for a change of venue under 28 U. S. C. 1404(a), asserting, inter alia, as to its first motion that it is a

corporation organized and existing under the laws of the State of Washington and therefore is not subject to service of process within the District of Hawaii; that plaintiff corporation was formed on May 31, 1963, its agreement with defendant began on July 1, 1963, and therefore its cause of action could not have accrued prior to that date; that defendant has not transacted business or been found within the District of Hawaii within the meaning of Clayton § 12 at any time from May 31, 1963 to the present; and therefore venue cannot lie in the District of Hawaii.

"[T]he only rule of law which is uniformly applicable to all cases involving venue . . . [is that] the decision depends entirely upon the particular facts involved." *Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Ass'n* [1965 TRADE CASES ¶ 71,443], 344 F. 2d 860, 863 (9 Cir. 1965).

¹ "Any suit, action or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof

it is an inhabitant, but also in any district wherein it may be found or transacts business. . . ." 15 U. S. C. § 22.

Both parties have filed affidavits and other exhibits in support of their respective positions, and the problems have been fully briefed and argued. From that evidence so submitted to this court, the court finds, in pertinent parts, that defendant manufactures two separate lines of heavy duty trucks: Peterbilt and Kenworth. Since July 1, 1963, Peterbilt has had in force contracts with two distributors in Hawaii: with Pell Co., Inc., of Hilo, Hawaii, dated March 1, 1962, and Honolulu Iron Works Company, of Honolulu, Hawaii, dated July 1, 1963. On July 1, 1963, Kenworth had in force a distributor contract with Von Hamm-Young Mercantile, Inc., of Honolulu. As of June 15, 1966, the Von Hamm-Young contract was terminated and Amfac, Inc. of Honolulu became Kenworth's Hawaiian distributor.²

Hawaiian orders for its trucks and parts are placed with defendant through the local distributors. Pacific Car has the option of accepting or rejecting a prospective purchaser's order. Once accepted, defendant processes and fills Hawaiian orders and makes delivery through its distributors. Defendant warrants its merchandise in Hawaii and requires that its distributors maintain adequate sales rooms and service stations and "keep and maintain a sufficient stock of repair parts on hand" to properly service its Hawaiian customers.³

Pacific Car has the absolute right to change prices and terms, as well as the construction and design of trucks, on any orders submitted, and the distributor is bound thereby. Its distributors must furnish Pacific Car, each month, with a list of all new customers, name, address, trucks delivered "and such other information as requested" by the defendant.⁴

Defendant's top management personnel have made goodwill, business expansion, and/or service visits to Hawaii from time to time, including: (1) three trips by Peterbilt's export sales manager between March 1964 and June 1965; (2) one trip to Hawaii by the general manager of Peterbilt in May 1965; and (3) one trip each by Peterbilt's gen-

eral manager and general sales manager in June 1965.⁵

Defendant's general manager while in Hawaii in May 1965, for business expansion purposes, engaged in negotiations with Hawaiian corporations for entry by those corporations with the defendant into the Australian market.⁶

Plaintiff's American promoter was a resident of Hawaii at the time he entered into negotiations and had discussions and visits in and out of Honolulu with the representatives of Peterbilt concerning its subsequent contract with plaintiff.⁷

Defendant, in support of its motion on the venue issue, relies heavily on the authority of *L. D. Reeder Contractors of Arizona v. Higgins Industries*, 265 F. 2d 768 (9 Cir. 1959) (action for breach of contract, case dismissed and service of process quashed because there was no minimum contract between defendant and the forum), and of *Kourkene v. American BBR, Inc.*, 313 F. 2d 769 (9 Cir. 1963) (action for breach of contract, service of process quashed for insufficient contact between defendant and the forum), urging that the above facts do not meet all of the three tests laid down in *Reeder* and that *Reeder* must be here controlling. Those three tests are (1) defendant must do some act or consummate some transaction within the forum; (2) the cause of action must arise out of or result from activities of defendant within the forum; and (3) assuming a minimum contact under tests (1) and (2), jurisdiction must be consonant with due process tenets of "fair play" and "substantial justice."

That *Reeder* was not an antitrust action must not be overlooked. The requirements for finding venue in diversity actions are much more stringent than the requirements for finding venue under Clayton § 12. Under Clayton § 12 the cause of action need not arise out of or result from activities of the defendant within the forum.⁸

Neither in *Reeder* nor *Kourkene*, nor *Mechanical Contractors Ass'n v. Mechanical Contractors A. of N. Cal.*, 342 F. 2d 393 (9 Cir.

² Affidavit of Robert D. O'Brien in Support of Defendant's Motion to Quash Return of Summons, To Dismiss, or for Change of Venue, pp. 2-3.

³ Exhibits "A" and "B" attached to Affidavit of Robert D. O'Brien in Support of Defendant's Motion to Quash, etc.

⁴ Exhibits "A" and "B", *supra* n. 3.

⁵ Letters marked "I", "J" and "K" referred to in Affidavit of Laurence C. O'Neill attached to Plaintiff's Supplemental Memorandum in Opposition to Defendant's Motion to Quash, etc.; also Affidavit of Robert D. O'Brien, *supra* n. 2.

⁶ Letter "J", *supra* n. 5.

⁷ Letters marked "A", "B", "C" and "D" referred to in Affidavit of Laurence C. O'Neill attached to Plaintiff's Supplemental Memorandum in Opposition, etc.

⁸ *U. S. v. Scophony Corp.* [1948-1949 TRADE CASES ¶ 62,238], 333 U. S. 794 (1948); *U. S. v. Nat. City Lines* [1948-1949 TRADE CASES ¶ 62,259], 334 U. S. 573 (1948); *Eastland Construction Co. v. Keasbey & Mattison Co.* [1966 TRADE CASES ¶ 71,722], 358 F. 2d 777 (9 Cir. 1966).

1965), did the Ninth Circuit interpret the venue requirements of Section 12 of the Clayton Act. The Clayton § 12 requirements were considered in *Courtesy Chevrolet, supra*, (civil antitrust action against the Walking Horse breeders' association). Although the *Reeder* tests were all met in *Courtesy Chevrolet*, the latter case does not require that those specific standards must be met in order to find venue in an antitrust action.⁹ The basic law of *Courtesy Chevrolet* is that one must consider the totality of the facts in each particular case to determine whether defendant is found or is doing such business therein as makes it reasonable or unreasonable to compel defendant to appear in the forum of plaintiff's choice. 344 F.2d 860, 865.

From the facts set forth, *supra*, it is clear that the defendant has carried on more than minimal business activities in the District of Hawaii. The fundamentals of the distributorship contract of the parties out of which this action has arisen, were initially negotiated in Hawaii. The defendant has three distributors within the district. The defendant has a very substantial control over the parts and services which must be kept and maintained by its distributors in Hawaii. Not dissimilar to *McGee*,¹⁰ the defendant's warranty is intended to and does apply in Hawaii to all of defendant's products sold throughout Hawaii. Defendant can, without notice to its distributors, change the prices and terms, as well as the construction and design of trucks destined for Hawaii, after the orders have been taken by its Hawaiian distributors, and such changes are binding on the distributor.¹¹ Defendant's sales, services and warranty requirements are thus welded to each sale in Hawaii of its products.

The activities in Hawaii of its top management officials during the years here involved, affecting not only its business in Hawaii but also its business in Australia, have been much more than minimal. Defendant's distributor contracts secure and maintain a tight control in Hawaii over almost every phase of the distributors' business save and except the actual job of selling

and servicing defendant's trucks. Cf. *Courtesy Chevrolet, supra*, at 865.

The above facts, inter alia, taken in their totality determine that this court must find that defendant has been and is doing business in Hawaii within the purview of Clayton § 12, and it is not unreasonable to compel the defendant to appear and answer in this forum. The court finds that venue is properly laid in the District of Hawaii.

As an alternative motion, upon determination of the venue problem adversely to the defendant, defendant seeks transfer pursuant to 28 U. S. C. 1404(a), to the United States District Court for the Western District of Washington, Northern Division, where it has its home office, alleging that the District of Hawaii is an inconvenient forum. Section 1404(a) provides for transfer when such would be "for the convenience of parties and witnesses, in the interest of justice." Since venue is properly laid in this forum the burden is on the defendant to show that a change of venue will advance the interests of justice and convenience.

In making this determination, the plaintiff's choice of forum should not be lightly set aside. In enacting Clayton § 12, Congress' concern was "to provide broader and more effective relief, both substantively and procedurally, for persons injured by violations of its antitrust policy. Insofar as convenience in bringing suit and conducting trial was involved, the purpose was to make these less inconvenient for plaintiffs, or, as was said in the *Eastman* opinion, to remove the 'often insuperable obstacle' thrown in their way by the existing venue restrictions." Congress "intended trial to take place in the district specified by the statute and selected by the plaintiff." The provisions of Clayton §§ 4 and 12 were each "designed" to aid plaintiffs by giving them a wider choice of venues, and thereby to secure a more effective, because more convenient, enforcement of antitrust prohibitions."¹²

Defendant argues that it will incur great expense and undue hardship in transporting

⁹ After the court had already determined that the acts of the defendant were sufficient to fulfill the venue requirements of Clayton § 12, it continued:

"Similar to the holding of this court in *Mechanical Contractors* [*supra*, 342 F.2d 393] we here also 'think that the totality of the facts shown by this record satisfies the three tests laid down by us in *L. D. Reeder Contractors of Arizona v. Higgins Industries, Inc.*, 9 Cir., 1959, 265 F.2d 768, and *Kourkens v. American B. B. R. Inc.*, 9 Cir., 1963, 313 F.

2d 769.'" (Emphasis added.) 344 F.2d 860, 866.

¹⁰ *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

¹¹ Cf. *McGee, supra* n. 10; *Travelers Health Assn. v. Virginia*, 339 U.S. 643 (1960); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

¹² *United States v. Nat. City Lines* [1948-1949 TRADE CASES ¶ 62,239], 334 U.S. 573, 581, 582, 588 (1948).

witnesses and documents to Hawaii in order to properly defend this action. However, at this stage of the litigation it is impossible for this court to ascertain with any definitive approximation the burden which defendant may incur. The availability of modern document duplicating equipment and depositions would certainly greatly reduce defendant's cost and inconvenience in conducting this litigation in Hawaii. Transfer, on the other hand, would further burden this foreign plaintiff who has chosen the American forum

nearest its home base to seek redress for its alleged grievances. Transfer under Section 1404(a) rests upon the discretion of the court, as determined on the facts of each particular case. In its present posture, the court does not find that the interest of justice demands transfer of this action.

It is therefore ORDERED that defendant's motions to quash summons or dismiss or transfer venue under 28 U. S. C. 1406(a) and for transfer under 28 U. S. C. 1404(a) be and hereby are Denied.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC CAR AND FOUNDRY COMPANY,
Petitioner,

vs.

HONORABLE MARTIN PENCE, UNITED
STATES DISTRICT JUDGE, DISTRICT
OF HAWAII, and L. C. O'NEIL
TRUCKS PTY. LIMITED,

Respondents.

FILED

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MEMORANDUM IN SUPPORT OF PETITION
FOR LEAVE TO FILE PETITION FOR
MANDAMUS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PACIFIC CAR AND FOUNDRY COMPANY,)
)
 Petitioner,)
)
 vs.)
)
 HONORABLE MARTIN PENCE, UNITED)
 STATES DISTRICT JUDGE, DISTRICT)
 OF HAWAII, and L. C. O'NEIL)
 TRUCKS PTY. LIMITED,)
)
 Respondents.)

No. 22565

MEMORANDUM IN SUPPORT OF PETITION
FOR LEAVE TO FILE PETITION FOR
MANDAMUS

I. JURISDICTIONAL STATEMENT

This court has jurisdiction of defendant's petition under 28 U.S.C. §1651 (the "All Writs Act"). Jurisdiction of the District Court was invoked under 15 U.S.C. §15 (Section 4 of the Clayton Act).

II. QUESTIONS PRESENTED

This petition raises several questions concerning the rights, under 28 U.S.C. 1406(a) and 1404(a), of a litigant sued in a far-off district with which it has, at most, minimal contacts, unrelated to the claims upon which the action is brought. The facts out of which the questions emerge are not in dispute.

The questions presented, the action of the District Judge and our views thereon may be summarized:

1. Does defendant, a Washington-based corporation, which manufactures trucks in Washington, California and Missouri, transact business through its distributors in Hawaii for purposes of amenability to suit there under Section 12 of the Clayton Act, 15 U.S.C. §22? The District Judge upheld out-of-state service on defendant at its headquarters in Renton, Washington on the ground that the defendant transacted business in Hawaii through its distributors in that state. In our view the District Judge, in reaching this conclusion, misread the distributors' agreements, copies of which are in the record (R. 35-42), drew unwarranted inferences concerning the nature and scope of defendant's activities and misapplied the principal precedents, including such decisions of this court as Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Assn., 344 F.2d 860 (9th Cir. 1965); L. D. Reeder Contractors of Arizona v. Higgins Industries, 265 F.2d 768, 774 (9th Cir. 1959) and Eastland Construction Co. v. Keasbey & Mattison Co., 358 F.2d 777 (9th Cir. 1966).

2. Where a Washington truck manufacturer's only contacts with Hawaii have been through its independent distributors there, and the claims against it do not arise from conduct in Hawaii, should an antitrust action brought by an Australian corporation, claiming improper termination of its right to sell defendant's trucks in Australia, be transferred from Hawaii to Washington on

defendant's motion under 28 U.S.C. §1404(a)? The District Judge in effect refused to exercise his discretion because "at this stage of the litigation it is impossible for this court to ascertain with any definitive approximation the burden which defendant may incur." (R. 112). In short, our position is that the entire purpose of Section 1404(a) would be thwarted if a defendant were forced to incur the burdens and expenses before its motion were definitively considered. The District Judge here had before him detailed facts concerning the burdens which trial in Honolulu would inflict on defendant. By the uncontroverted affidavit of the chairman of its board, defendant:

- (a) listed 45 potential witnesses residing in the Western District of Washington, identifying each as to his knowledge of the facts (R. 26-30);
- (b) listed eleven more potential witnesses, for whom trial in Hawaii would be a burden (R. 30-31);
- (c) estimated that the cost of transporting witnesses to Hawaii for trial would be between \$12,000 and \$15,000, and that the subsistence of these 56 witnesses in Honolulu for an extended trial would "be extremely expensive" (R. 31).
- (d) stated that, based upon the fact that most of the key corporate officials of defendant were vital witnesses, "If trial of this case were to be held in Honolulu, it would severely disrupt the operations of defendant..." and

(e) set forth detailed facts concerning the location and volume of corporate records which would probably have to be moved to Honolulu (R. 31-34).

3. Should mandamus be granted to review denial of defendant's motion to quash return of summons, dismiss or transfer under 28 U.S.C. §1406(a), or transfer under 28 U.S.C. §1404(a)? The very complete record below presented to the District Judge all of the facts relevant to decision of the motion. Instead of deciding the forum non conveniens part of the motion in defendant's favor, in accordance with the facts and the law, the District Judge in effect deferred action on it to see whether defendant really would incur the irreparable damage it sought to avoid. In deciding whether defendant was amenable at all to suit in Hawaii, the District Judge misinterpreted the undisputed facts and misapplied well-established legal principles. In these circumstances defendant is entitled to mandamus. Otherwise, it may win the lawsuit but spend an unnecessary hundred thousand dollars or more in unreimbursable costs, to defend itself thousands of overwater miles from home.

With our petition we have filed, with an affidavit of counsel, true copies of those portions of the record in the District Court deemed pertinent to the foregoing questions. These consist of pleadings (herein "R. ____"), including the order denying our motion (R. 106-113), and the transcript of the argument on the motion (herein "Tr. ____").

Before stating the legal reasons which support our petition, we shall summarize the pleadings and proceedings to this point and

the facts which bear upon the issues presented.

III. RESUME OF PLEADINGS AND PROCEEDINGS

On August 31, 1967, a complaint seeking \$8,250,000 in damages under Sections 1 and 2 of the Sherman Act was filed against petitioner as sole defendant in the District of Hawaii (R. 3-9). Petitioner (herein called defendant) manufactures two lines of trucks, Kenworth and Peterbilt, through separate divisions of the company. The Kenworth Division, which has factories in Seattle, Washington and Kansas City, Missouri, and the Peterbilt Division, which has a factory in Newark, California, are named as "co-conspirators", along with Robert D. O'Brien, chairman of defendant, a resident of Seattle; Kenworth Motor Trucks Pty. Ltd., an Australian subsidiary of defendant; Robert E. MacGilvra, an Australian resident who is managing director of the subsidiary, and Cameron Kenworth Pty. Ltd., an Australian distributor of Kenworth trucks (R. 4).

Plaintiff was organized on May 31, 1963 under the laws of New South Wales (R. 64) "for the purpose of selling in Australia Peterbilt trucks and truck parts. On July 1, 1963, it entered into an exclusive Distributor's Contract with Peterbilt Motors Company Division of Pacific." (R. 6). According to plaintiff, it was notified in December, 1965 that Peterbilt trucks would no longer be supplied to the Australian market (R. 48).

In January, 1966, plaintiff was appointed a distributor of Kenworth trucks and parts in Australia (R. 6, 48). In early 1967, plaintiff's franchises were terminated by defendant (R. 6, 48). According to plaintiff's complaint the termination, stemming from a

conspiracy which began "some time prior to December, 1965", unreasonably restrained the foreign trade and commerce of the United States, contrary to Section 1 of the Sherman Act, and evinced an attempt by defendant to monopolize the exportation of heavy-duty trucks from the United States to Australia, contrary to Section 2 of the Sherman Act (R. 4-9).

With its complaint plaintiff filed a motion to produce under Rule 34 (R. 14-17), calling for inspection of most of the records of defendant and its Kenworth and Peterbilt divisions, back to January 1, 1958 (R. 32). All of the documents were asserted to be relevant to the action (R. 13-22).

Upon plaintiff's representation that defendant resided in Renton, Washington, an order issued allowing service of summons without state (R. 10-12), pursuant to which defendant was served at its corporate offices in Renton. The only reference to Hawaii in the complaint was the bare statement that "Defendant is found and transacts business in the District of Hawaii". (R. 3).

In due course defendant served and filed a motion (1) to quash return of summons or to dismiss the action or transfer it to the Western District of Washington, Northern Division, under 28 U.S.C. §1406(a), or (2) if that motion were denied, for change of venue to that district under 28 U.S.C. §1404(a) (R. 43-45). The grounds were, in short, that defendant did not do business in Hawaii, and, therefore, venue in that district was improper; and, alternatively, that trial in Hawaii would cause defendant great and unjustifiable expense and disruption of business, and

that the interest of justice required transfer of the action. Defendant's motion was supported by the affidavit of its chairman, Mr. O'Brien, to which were attached copies of distributor's contracts between defendant and its Hawaiian distributors (R. 23-42). In opposition to the motion, plaintiff filed an affidavit by its chairman, Laurence C. O'Neil, identifying certain correspondence (R. 60-83), and an affidavit by plaintiff's Honolulu counsel naming six potential witnesses said to be residents of or "connected with" Hawaii (R. 84-87).

Defendant filed reply affidavits by Mr. O'Brien (R. 93-105), by Mr. D. F. Pennell, a vice president of defendant (R. 91-92) and by counsel (R. 88-90).

Defendant's motion was argued before The Honorable Martin Pence on October 23, 1967 (Tr. 1-68). Judge Pence reserved his ruling. On December 26, 1967, an order was filed denying petitioner's motion in all of its alternative forms (R. 106-114).

IV. SUMMARY OF FACTS

A. Facts Relevant to Defendant's Motion to Dismiss or Transfer Under 28 U.S.C. §1406(a) on the Ground That It Does Not Transact Business in Hawaii

Defendant's motion and original supporting affidavit covered its activities for the period from July 1, 1963 to date. The date of July 1, 1963 was selected for two reasons. First, that was the date of the Distributor's Contract between defendant's Peterbilt Division and plaintiff (R. 6, 48, 99). Second, since this action was filed on August 31, 1967, any cause of action

which accrued before July 1, 1963 would be prima facie barred by the statute of limitations (15 U.S.C. §15b)*.

The basic facts, as set out in Mr. O'Brien's affidavit (R. 23-34) are that defendant is, and has been since its incorporation in 1924, a Washington corporation, with its corporate offices located in Renton, Washington, in the Northern Division of the Western District of Washington. Neither defendant nor any of its divisions or subsidiaries has at any time since July 1, 1963:

- (a) Been licensed or registered to do business in Hawaii.
- (b) Maintained any office in Hawaii.
- (c) Had any officer, director, employee or agent who resided in Hawaii.
- (d) Owned or leased any real or personal property or maintained any stock of goods in Hawaii.
- (e) Maintained any bank account in or financed any transaction through any bank in Hawaii.
- (f) Had any licenses or permits from the State of Hawaii or any municipal subdivisions thereof.
- (g) Purchased any products in Hawaii.

*"Transacts business" as that phrase is used in Section 12 of the Clayton Act (15 U.S.C. §22), refers back to the time when the cause of action accrued. Eastland Const. Co. v. Keasbey & Mattison Co., 358 F.2d 777 (9th Cir. 1966). Plaintiff's claim for damages could hardly be said in any case to have accrued before July 1, 1963.

No employee of defendant or of any division or subsidiary of defendant makes regular calls on customers within the State of Hawaii. Infrequent goodwill or service visits are made on Kenworth and Peterbilt distributors, generally in response to requests by such distributors (R. 24).

Since July 1, 1963, Peterbilt has had in force contracts with two distributors in Hawaii and Kenworth has had one Hawaiian distributor (R. 24-25). Copies of one of the Peterbilt contracts and of the Kenworth contract were attached to Mr. O'Brien's affidavit (R. 35-42). The other Peterbilt contract is in the same form as the one attached (R. 25).

Neither defendant nor any of its divisions or subsidiaries has or has had any ownership or financial interest in any Peterbilt or Kenworth distributor in Hawaii.

Neither defendant nor Peterbilt nor Kenworth has any control over the location, facilities, financial or other operations of any distributor in Hawaii. Orders obtained by the distributors must be accepted by Peterbilt or Kenworth respectively. Shipments of trucks and parts are made by Peterbilt f.a.s. Oakland or San Francisco, California, and by Kenworth f.a.s. Seattle or Tacoma, Washington (R. 25).

The burden of the affidavit of Laurence C. O'Neil (R. 66-83), chairman of plaintiff, in reply to defendant's motion, was that Robert N. Larkin, former half owner of plaintiff, had resided in Hawaii for eight years until about mid-March, 1963. (See

Exhibit "D" to O'Neil affidavit (R. 72), a letter from Larkin to O'Neil of February 28, 1963, announcing that Larkin would leave Hawaii for Australia on March 19, 1963, and Exhibit "E" to the O'Neil affidavit (R. 73), a letter from Larkin in Australia dated April 3, 1963 to A. R. Gould, then general sales manager of defendant's Peterbilt Division in Newark, California); that Larkin had corresponded from Hawaii to Newark, California in February and early March, 1963, concerning the possibility of establishing a distributorship in Australia (See Exhibits "A", "B" and "F" to O'Neil affidavit (R. 67-70, 74-75); and finally that in 1965, at plaintiff's instance, defendant had talks with representatives of one of its Hawaiian distributors, Honiron, concerning the possibility that the distributor might invest in plaintiff (See Exhibits "I", "J" and "K" to O'Neil affidavit R. 79-83).

In reply to the O'Neil affidavit, defendant filed affidavits, the gist of which was to relate the details of talks with Honiron in 1965, which never got off the ground (R. 91-92), and of the early discussions with Larkin, in Seattle and Newark, California in January and February, 1963 (R. 93-95).

All of the personal discussions between representatives of the plaintiff and defendant and its divisions from the inception of the distributorship agreement on July 1, 1963 until suit was commenced were held either in Australia or in California or Washington; none was held in Hawaii. Likewise, all correspondence

between the parties was between Australia and California or Washington; no correspondence between the parties was sent to or from Hawaii (R. 98).

The chronology of principal events shown by the record is:

Late January, 1963:

Initial contact between Robert Larkin, who later became half owner of plaintiff, and representatives of defendant at Newark, California and Seattle, Washington.

April, 1963:

Mr. Gould, general sales manager of Peterbilt, went to Australia to confer with Messrs. Larkin and O'Neil relative to their setting up Peterbilt distributorship in Australia.

May 10, 1963:

Mr. Larkin makes written "proposals" to Peterbilt for a Peterbilt distributorship for all Australia (R. 102-05).

May 31, 1963:

Plaintiff was incorporated in New South Wales (R. 64).

July 1, 1963:

Distributorship agreement between Peterbilt Motors Company and plaintiff (Peterbilt (Aust.) Pty. Ltd.) executed.

December, 1965

Defendant reaches decision to set up assembly plant for Kenworth trucks in Australia and phase out sale of Peterbilts to Australia.

January 6, 1966:

Meeting in Mr. O'Brien's office in Seattle with representatives of plaintiff regarding decision to set up assembly plant for Kenworth trucks in Australia. Plaintiff became Kenworth distributor effective that date.

March, 1966:

Mr. O'Brien went to Australia to announce to Australians defendant's plans to assemble Kenworth trucks there, to phase out the export of Peterbilts and to set up an Australian subsidiary.

July 15, 1966:

Kenworth Motor Trucks Pty. Ltd., a subsidiary of defendant, was incorporated in Victoria, Australia.

March 30, 1967:

Termination of the plaintiff as Kenworth and Peterbilt distributor in Australia became effective (R. 98-100).

B. Facts Relevant to Defendant's Motion
to Change Venue Under 28 U.S.C. §1404(a)
"For the Convenience of Parties and Wit-
nesses, in the Interest of Justice"

In support of its alternative motion to change venue to the Western District of Washington, defendant, through Mr. O'Brien's affidavit, listed 45 potential witnesses who reside in the Western District, and identified the area of testimonial knowledge of each witness (R. 26-30). Defendant listed eleven additional witnesses, mostly from Northern California, for whom Seattle would be more convenient than Honolulu (R. 30-31).

Mr. O'Brien stated that of the eighteen members of the defendant's corporate staff who were listed in the affidavit, at least twelve had had discussions with representatives of plaintiff (R. 31). Hence, "if the trial were held in Honolulu, it would severely disrupt the operations of defendant, since an extended trial in Honolulu might require the presence in Hawaii of the top management of the company who, if the trial were held in Seattle, could continue to carry out their responsibilities during the trial, at least on a part-time basis". (R. 31-32).

Mr. O'Brien further pointed out that the corporate records are maintained in Renton, Washington, that the Kenworth Division records are kept principally in Seattle and the Peterbilt records are kept at Newark, California (R. 32). Mr. O'Brien analyzed (R. 32-34) four of the categories of documents which plaintiff had contended in its motion to produce were relevant to its action (R. 13-22). The expense and inconvenience to defendant of bringing these documents to Honolulu was demonstrated by the fact that Kenworth alone maintains some 1,000 file drawers of records pertaining to its operations and destroys some 300 file drawers of material annually (R. 32-33). Most of these documents would be relevant if plaintiff's motion for production were well taken (R. 32).

Plaintiff did not controvert Mr. O'Brien's affidavit. The only opposing material filed was an affidavit by counsel listing

six potential witnesses said to be connected with Hawaii. Of these, four were said to have had conversations with representatives of defendant (R. 85-86). One of these, J. Moir, was listed as living in "Honolulu, Hawaii". However, Mr. Moir, according to a letter dated October 27, 1967 attached to an affidavit of defendant's counsel, stated that he had not resided in Honolulu since January, 1964 (R. 88-90). Another of the six was simply identified as "George Reed, Director of L. C. O'Neil Trucks, Inc.". Reed was thus not claimed to have testimonial knowledge beyond the fact that he was a director of the Delaware corporation which owns a majority interest in the Australian plaintiff.

V. ARGUMENT

A. Defendant Does Not Transact Business in Hawaii Within the Meaning of Section 12 of the Clayton Act (15 U.S.C. §22)

The District Judge found that defendant transacted business in Hawaii and that it, therefore, could be sued in that jurisdiction under Section 12 of the Clayton Act (R. 106-111). That section provides:

"Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

It is clear that defendant is not "found in Hawaii":

"A corporation is 'found' within a district when it has an agent authorized to receive service of process, or when it may be deemed present within the district due to the presence of officers or agents carrying on the business of the corporation." 1 Moore's Fed. Prac. (2d ed. 1964) 1668, ¶0.144[15].

The fact that defendant is not "found" in Hawaii is recognized by plaintiff's motion for out-of-state service and the order thereon (R. 10-12).

The question, therefore, is whether defendant transacts business in Hawaii through its contacts with distributors there, an issue which depends upon common-law principles of agency. 1 Moore, *supra*, at 1666-67, ¶0.144[15]. Application of these principles, in turn, hinges on the degree of control reserved by defendant over the affairs of its distributors. When a venue defense is asserted, the burden rests upon the plaintiff to support the venue. United Industrial Corp. v. Nuclear Corp. of America, 237 F. Supp. 971, 979 (D. Del. 1964) and cases cited there.

In his written order denying defendant's motion, the District Judge cited several contacts by defendant with Hawaii which he held indicated that defendant transacted business there.

(1) Distributor's Agreement

It is well established that sale of products through a local distributor will not in itself provide a basis of jurisdiction over a foreign manufacturer. Sanders Assoc., Inc. v. Galion Iron Works & Mfg. Co., 304 F.2d 915, 920 (1st Cir. 1962) and cases cited there.

The Judge here held that by its agreements with its distributors, "Defendant's sales, services and warranty requirements are ... welded to each sale in Hawaii of its products." (R. 111). Whether defendant's "sales, services and warranty requirements are welded to each sale" would seem to be beside the point. The real question is whether defendant retains such controls that its distributors are its agents through whom it does business. The District Judge's conclusions on this score were based on mistaken reading of the distributor's contract.

The District Judge stated that "Hawaiian orders for its trucks and parts are placed with defendant through local distributors. Pacific Car has the option of accepting or rejecting a prospective purchaser's order. Once accepted, defendant processes and fills Hawaiian orders and makes delivery through its distributors." (R. 107-08). This implies that defendant sells to Hawaiian retail buyers, and that the distributors are defendant's agents. Neither is correct. As is shown by the agreements and by Mr. O'Brien's affidavit (R. 25, 35-42) defendant sells trucks to the distributors f.a.s. Seattle or Tacoma, Washington or San Francisco or Oakland, California and it is expressly agreed that the distributors are not defendant's agents for any purpose. (R. 24-25 and Sections 2 and 16 of the agreements).^{*} Moreover, the fact that

^{*}Amfac, Inc., the Kenworth distributor, could hardly be considered a controlled agent of Kenworth. It sells several other lines of trucks (R. 87).

a manufacturer reserves the right to accept or reject an order of a distributor would militate against an agency relationship. See e.g., Ohio-Midland Light & Power Co. v. Ohio Brass Co. 221 F. Supp. 405 (S.D. Ohio 1962).

The District Judge further stated, "Pacific Car has the absolute right to change prices and terms, as well as the construction and design of trucks, on any orders submitted, and the distributor is bound thereby." (R. 108). The Judge is mistaken. Defendant retains no such rights. The distributors are given an absolute right by Section 3 of the distributor's contracts (R. 35, 39) to cancel any order "as to which such price increase is applicable." Defendant reserves the right to make changes in design only in the narrow context that such changes result in "betterment" of the trucks. The provision does not indicate retention of controls by defendant, except in the very restricted sense that defendant cannot be forced by a distributor to retool its factory to provide designs which have been superseded.

The only other provisions cited by the District Judge to support his conclusion that the distributors are the agents of the defendant, rather than independent contractors, are provisions relating to warranties, maintenance of adequate sales and service facilities and the furnishing of information concerning sales (R. 108). Such provisions are standard in any distributor contract. If they constitute the control necessary to convert an independent dealer to an agent, then, contrary to case law, every

distributor is the agent of his manufacturer. The sweeping inference drawn by the District Judge that these provisions indicate "very substantial control" is simply unwarranted by the language of the agreements. Neither Kenworth nor Peterbilt maintains any control over the location, facilities or financial or other operations of a distributor. The distributor is left entirely on his own to develop his territory in any way he sees fit. He merely undertakes, by Section 11, to maintain sales and service facilities adequate "to meet the requirements of his trade." Examination of the precedents shows that the courts have required much more to sustain a holding that it is the manufacturer which is transacting the business done by its distributor. In fact, several courts have held that even the presence of a subsidiary of the defendant acting as a distributor in the forum district is insufficient to satisfy jurisdiction over a parent under Clayton Section 12, unless the parent company exercises control over the day-to-day operations of the resident corporation. Zwingle v. Tyson's Foods, Inc., 241 F. Supp. 940 (W.D. Okla 1965); see Fisher Baking Corp. v. Continental Baking Corp., 238 F. Supp. 322 (D. Utah 1965); School District v. Kurtz Bros., 240 F. Supp. 361 (E.D. Pa. 1965).

The case involving a manufacturer-distributor relationship which appears to present the clearest parallel to the instant facts is Ohio-Midland Light & Power Co. v. Ohio Brass Co., 221 F. Supp. 405 (S.D. Ohio 1962). The question there was whether the manufacturer because of the terms of its contracts and contacts with its distributors, transacted business in the Southern District of Ohio for

purposes of venue under Section 12. Some of the facts pertaining to the relationship are quoted by the court from an affidavit filed by Lapp Insulator Company, the manufacturer, in support of its motion to dismiss:

"No officer, director or employee of Lapp resides in Ohio.

"No employee of said Company makes regular calls on customers within the Southern District of Ohio. Infrequent good will visits are made on individual customers, no attempt being made to cover all possible purchasers.

"Two independent concerns located in the Southern District of Ohio solicit orders for Lapp's products: for insulators, Harry Fisher Associates, Inc., having offices in Cleveland and Columbus, Ohio; for other products, White Industrial Sales and Equipment Company, having offices in Cincinnati, Ohio.

"Lapp has no ownership or financial interest in either of the above named concerns.

"All of Lapp's sales representatives, including Harry Fisher Associates, Inc. and White Industrial Sales and Equipment Company, are completely independent of Lapp. Lapp has no control over their location, facilities, financial operations, and the like. Such agents are compensated by a commission based upon consummated sales.

"Orders obtained by Harry Fisher Associates, Inc., White Industrial Sales and Equipment Company, and Lapp's other sales representatives must be accepted by Lapp at its offices in Le Roy, New York. Shipments are made by Lapp f.o.b. factory by common carrier directly to customers in Ohio from its plant in Le Roy, New York. Bills are sent directly to customers from Lapp's offices in Le Roy, New York." (221 F. Supp. at 406-07).

On these facts, the court held:

"Even applying this broad definition of 'transacting business', this Court concludes that the contacts of defendant Lapp within this district

are not sufficient to constitute 'transacting business' within the district." (221 F. Supp. at 408).

On much the same facts as Ohio-Midland, a district judge in this circuit granted a manufacturer's motion to quash in Austad v. United States Steel Corp., 141 F. Supp. 437, 441 (N.D. Cal. 1956).

The opinion of the Eighth Circuit in Simpkins v. Council Mfg. Corp., 332 F.2d 733 (8th Cir. 1964), applying Missouri law, illustrates well the tests generally applied to determine propriety of venue founded on a manufacturer's relationship with its distributors. In affirming the district judge's ruling of dismissal for want of jurisdiction, the court quoted the following from the lower court's opinion:

"'He, [the distributor] nevertheless, purchases equipment from numerous manufacturers and re-sells the same to customers in various parts of the contry, particularly in the midwest. Littrell is not an employee of Council Manufacturing Corporation, but operates as an independent contractor. All purchases of Littrell from defendant are at distributors prices, and Littrell re-sells to his customers at prices fixed by him. Defendant furnishes Littrell with advertising material regarding its machines but Littrell develops his own customers, conducts his own advertising, provides his own repair service to customers and is not subject to any direction, control or authority of defendant. Littrell purchases from defendant on his own account, normally attaches payment with the purchase order, and provides delivery of the equipment at the customer's cost.'" (332 F.2d at 735).

Also see Woodlawn Realty Corp. v. Smith-Scott Co., 226 F. Supp. 704, 705 (D. Mass. 1964) and Bruner v. Republic Acceptance Corp., 191 F. Supp. 200 (E.D. Ark. 1961).

the courts have sustained venue against manufacturers on the basis of day-to-day control over distributors within the forum district. Thus, in Volkswagen Interamericana, S.A. v. Rohlsen, 360 F.2d 437 (1st Cir. 1966), cert. den. 385 U.S. 919 (1966), the court denied a motion to dismiss, where it found, "Defendant's dealers were not mere buyers, or outlets for its products, but, as we have indicated, were subject to its detailed supervision and control". (360 F.2d at p. 440). Among the controls retained by the manufacturer, were,

"... the right to control, inter alia the dealer's automobile and spare parts inventory, its area of distribution, the number of salesmen and customers' service personnel in its employ, and even its stationery and business forms." (360 F.2d at p. 440).

For another example, see Fiat Motor Co. v. Alabama Imported Cars Inc., 292 F. 2d 745 (D.C. Cir. 1961), cert. den. 368 U.S. 898 (1961).

(2) Visits to Hawaiian Distributors

The District Judge cited the following facts to support his conclusion that defendant transacted business in Hawaii:

"Defendant's top management personnel have made goodwill, business expansion, and/or service visits to Hawaii from time to time, including: (1) three trips by Peterbilt's export sales manager between March 1964 and June 1965; (2) one trip to Hawaii by the general manager of Peterbilt in May 1965; and (3) one trip each by Peterbilt's general manager and general sales manager in June 1965 (R. 108).

The record is barren of evidence that any of the trips were for "business expansion". The only references to Hawaiian trips are in Mr. O'Brien's affidavit where he states that, "Infrequent

goodwill or service visits are made on Kenworth and Peterbilt distributors, generally in response to requests by such distributors" (R. 24) and in correspondence attached to Mr. O'Neil's affidavit (R. 79-83). The trips made to Hawaii by Peterbilt's export sales manager were made, according to the letter from the distributor to Mr. O'Neil, to provide "assistance in our promotion of sales of Peterbilt trucks in the Hawaiian Islands." (R. 79). Thus, the trips were made at the instance of the distributor to assist with its promotion. Such goodwill visits to distributors do not constitute the transaction of business under Section 12 of the Clayton Act. Ohio-Midland Light & Power Co. v. Ohio Brass Co. 221 F. Supp. 405, 406-07 (S.D. Ohio 1962); compare L.G. Reeder Contractors of Ariz. v. Higgins Industries, 265 F.2d 768 (9th Cir. 1959).

The circumstances of the 1965 trips are explained fully in the affidavit of Donald F. Pennell (R. 91-92). While in Hawaii in May, Mr. Pennell, then general manager of Peterbilt, discussed, at plaintiff's request, the possibility of Honolulu Iron Works investing in plaintiff. However, "nothing came of our conversation" (R. 92). The letter to Mr. O'Neil by Mr. Pennell (R. 80-81) was merely a report of the contact made with Honiron. Plaintiff makes no contention that this abortive attempt by it to seek outside capital has any nexus with its present claims.

Contrary to the opinion of the District Judge, this court has held that to support jurisdiction over a non-resident under Clayton Section 12, the plaintiff's cause of action must arise

from the activities of the defendant in the forum.

(3) The Cause of Action Did Not Arise from
an Activity of Defendant in Hawaii

The District Judge, in his opinion, cited United States v. Scophony Corp., 333 U.S. 794 (1948), United States v. National City Lines, 334 U.S. 573 (1948) and Eastland Construction Co. v. Keasbey & Mattison Co., 358 F.2d 777 (9th Cir. 1966), as holding that, "under Clayton §12 the cause of action need not arise out of or result from activities of the defendant within the forum." (R. 109). None of the cited cases so holds. To the contrary, in each case there is reference to the legislative intent of Section 12 to give an antitrust plaintiff the opportunity to sue where the injury occurred. Thus, in Scophony, the Court interpreted the legislative purpose of Section 12:

"Thereby it [Congress] relieved persons injured through corporate violations of the antitrust laws from the 'often insuperable obstacle' of resorting to distant forums for redress of wrongs done in the places of their business or residence. A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even without retreating to its headquarters defeat or delay the retribution due." (333 U.S. at p. 808).

The defendant in Scophony was a British firm which was accused of committing violations of the antitrust laws in the forum, the Southern District of New York. In National Van Lines, the Supreme Court quoted with approval the Scophony statement of Congressional intent as to Section 12. (334 U.S. 580).

some length the legislative and judicial history of Section 12. It concluded, citing Sconhony and National Van Lines, along with Eastman Kodak Co. v. Southern Photo Co., 273 U.S. 359 (1927) that "... Congress's underlying assumption [in enacting Section 12 was] ... that antitrust injuries usually result from business activity of the corporate offender occurring in the victim's home district." (358 F.2d at 780).

The requirement that for venue purposes the cause of action against a non-resident corporation arise from activities in the forum district has been directly considered by this court in several cases, namely. L. D. Reeder Contractors v. Higgins Industries, Inc., 265 F.2d 768 (9th Cir. 1959); Kourkene v. American BBR, Inc., 313 F.2d 769 (9th Cir. 1963); Mechanical Contractors Assn. v. Mechanical Contractors Assn. of Northern Cal., 342 F.2d 393 (9th Cir. 1965) and Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Assn., 344 F.2d 860 (9th Cir. 1965).

In Reeder, an action based on diversity of citizenship, this court analyzed at length the evolution of the concept of "doing business" in the law relating to jurisdiction over non-residents. The court enunciated and discussed three elements which must concur to support such jurisdiction. The second of these was stated to be

"(2) The cause of action must be one which arises out of, or results from, the activities of the defendant within the forum. It is conceivable that the actual cause of action might come to fruition in another state, but because of the activities of defendant in the forum state there would still be a 'substantial minimum contact.'" (265 F.2d 768, 773-74, footnote 12).

The three requirements of Reeder were cited and applied in the Kourkene and Mechanical Contractors cases, neither of which involved Section 12 of the Clayton Act. The most recent case wherein this court adhered to and applied the three rules was a Section 12 case, Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Assn., 344 F.2d 860, 865-66 (9th Cir. 1965). The District Judge in the instant case held that the application of the Reeder rules in Courtesy to be dicta (R. 110). We respectfully disagree. We cannot understand why, if satisfaction of the second Reeder requirement was not deemed necessary in Courtesy, the court made so much of the fact that the alleged violations occurred in the forum district. On page 864, the court states that defendants' argument ignores its contacts in California, "and even more important it overlooks the fact that even though the Association otherwise operated in California by mail, by mail it deliberately and intentionally brought about in California the very injuries now complained of." (Italics in original). If the requirement that the contacts within the forum give rise to the injuries were somehow a makeweight of no concern in a Section 12 case, why, one might reasonably ask, was the court speaking of it being "even more important" than any other consideration; what message was the court intending to deliver by italicizing the fact that the defendants' violation had caused injury in California? If there were any doubt, it is dispelled by the court's ultimate holding on page 866, after citing the three Reeder requirements, "We conclude that the claims of the appellant arise out of or result from just such acts and transactions [in the forum]." This ultimate holding in a

long, carefully written opinion would be a meaningless non-sequitur if there were no requirement in a Section 12 case that the acts of defendant in the forum give rise to the cause of action.

(4) Defendant's Activities in Hawaii Do
Not Satisfy Second Reader Requirement

The District Judge stated in his opinion, "Plaintiff's American promoter was a resident of Hawaii at the time he entered into negotiations and had discussions and visits in and out of Honolulu with the representatives of Peterbilt concerning its subsequent contract with plaintiff." (R. 108-09). For this statement the judge cites four letters (R. 67-72). None of these indicates any negotiation with defendant in Honolulu concerning a possible Peterbilt franchise. They do show, as is more particularly demonstrated by the affidavit of Mr. O'Brien (R. 93-95), that Mr. Larkin talked in general terms with representatives of defendant in Seattle and Newark, California in late January, 1963 concerning his plans for Australia.

It seems to us, however, that all of these preliminary talks are quite beside the point. In Eastland Construction Co. v. Keasbey & Mattison Co., 358 F.2d 777, 780 (9th Cir. 1966), this court held:

"Nevertheless, we conclude that under section 12 of the Clayton Act, venue is properly laid against a corporate defendant in any district in which the defendant was transacting business when plaintiff's cause of action accrued."

The inference is unmistakable from Eastland that activities by a defendant in a forum which antedate accrual of the action are

not weighed in the transacting business scale.* Under Eastland Mr. Larkin's residency in Hawaii until mid-March of 1963, and the fact that communications were addressed by defendant to him there in February and March, 1963 should be irrelevant to the issue of whether defendant transacts business in Hawaii for purposes of amenability to suit there for a cause of action arising from a distributor's contract dated July 1, 1963 (R. 6), made by defendant with a corporate plaintiff which was not even born until May 31, 1963. Exhibits "A" through "H" to Mr. O'Neil's affidavit, relied upon by the District Judge to support his finding that defendant transacts business in Hawaii, are all dated before May 31, 1963, the date when plaintiff began its corporate life (R. 98). Plaintiff does not purport to sue on an assigned claim, or argue that its cause of action accrued while it was still in the womb of time.

B. The District Judge Should Have Transferred The Action to the Western District of Washington

Section 1404(a) provides as follows:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Since the defendant is a Washington corporation with its corporate offices and several of its plants located in the Western District of Washington, the action could unquestionably have been

* During oral argument the District Judge expressed disdain for the "antitrust experience and ... antitrust decisions" of the author of the Eastland opinion, observing that, "upon one occasion I construed some of his words as dicta." (Tr. 57-58). The District Judge's ultimate decision indicates that he gave little or no credit to Eastland.

brought there. Defendant also has factories in Newark, California and Kansas City, Missouri. Counsel for plaintiff conceded in argument that the "case could have been tried in a few other forums, but the question that this Court has to decide on the moving papers before it now is, is it the home park of the defendant or in a neutral forum such as Hawaii". (Tr. 40).

The District Judge devoted only one relatively short paragraph to defendant's motion under Section 1404(a). The reasons he assigned for denial of the motion were:

1. The motion should be denied until the burdens and expenses by defendant became realities.
2. Modern techniques of duplicating records and deposing witnesses would reduce defendant's costs and inconvenience in conducting this litigation in Hawaii.
3. The plaintiff's choice of forum should not be lightly set aside.
4. Transfer would "further burden this foreign plaintiff who has chosen the American forum nearest its home base...." (R. 112-13).

In our view if the foregoing reasons are deemed sufficient to deny transfer, under the instant facts, then Section 1404(a) is a dead letter. Our reasons follow:

1. The District Judge stated that "at this stage of the litigation it is impossible for this court to ascertain ... the burden which defendant may incur." (R. 112).

This is a little like saying that there's no sense avoiding a known fire hazard because until the barn burns no one can adequately evaluate the damages to be incurred. Defendant's evaluation of its potential damage was as definite as it could possibly be before the fact. It named 45 potential witnesses who resided in the Western District of Washington, gave their home addresses and indicated the probable areas of their testimony (R. 26-30). It named eleven more witnesses for whom Seattle would be a much more convenient forum (R. 30-31). It stated the round-trip air fare to Honolulu and estimated total travel expense. It predicted that subsistence for these 56 witnesses in Honolulu "would be extremely expensive", a fact which we believe should be judicially noticeable. It pointed out that the key witnesses for defendant would be the people who run the defendant's business and stated the obvious fact that trial in Honolulu would "severely disrupt the operations of defendant" (R. 31). It took plaintiff's motion for production of documents at face value and analyzed the nature and number of the records which might probably be needed in Honolulu (R. 32-34).

To counter this, plaintiff filed an affidavit listing six potential witnesses connected with Hawaii. Plaintiff had to reach awfully hard to find six. One of the six, J. Moir, states that he has not lived in Honolulu since January, 1964 (R. 90). Another, George Reed, is not asserted to have knowledge of any relevant fact, but merely serves as a director of the Delaware corporation which controls the Australian plaintiff (R. 86).

exercise his discretion on the motion to transfer. Rather, he suggested that the 56 witnesses be deposed (R. 112), that the 1,000 or more file drawers of records (R. 32-33) be copied by "modern document duplicating equipment" (R. 112), and assessment of the damages to defendant be postponed. Under this ruling defendant will presumably only be able to make the necessary showing in time to move the case closer to home for post-trial motions.

One is reminded of the observation of the Fourth Circuit in General Tire & Rubber Company v. Watkins, 373 F.2d 361, 370 (4th Cir. 1967), where in granting a petition for mandamus it said,

"It is obvious that if we postpone action until appeal after final judgment, the question will have become moot and the damage done...."

2. The District Judge's statement that, "the plaintiff's choice of forum should not be lightly set aside" (R. 112) while correct as a generality, has little application to the instant case.

Plaintiff's choice of venue is entitled only to minimal consideration where, as here, the plaintiff is not a resident of the district and such contacts as defendant has with the forum district are irrelevant to the subject matter of the litigation. Typical of the many holdings supporting this principle is the following excerpt from the opinion of District Judge MacMahon in Polaroid Corp. v. Casselman, 213 F. Supp. 379, 383 (S.D. N.Y. 1962):

"In view of this all but complete lack of nexus with the forum, suit in this district can only be justified on the basis of the venue privilege given plaintiff by Sections 16(b) and 27 of the Securities Exchange Act of 1934. Normally plaintiff's choice of a technically proper venue is accorded some weight in the court's determination of the propriety of a transfer under 28 U.S.C. §1404(a). Judicial reluctance to disturb the plaintiff's choice, however, is a vestige of the harsh consequence of dismissal under the old doctrine of forum non conveniens. But an asserted right to choice of forum is, at best, a bootstrap argument under Section 1404(a) for if accorded decisive significance no action would ever be transferred. Thus, it is only one factor to be considered and is entitled to no weight whatever where it appears that the plaintiff was forum shopping and that the selected forum has little or no connection with the parties or the subject matter.

"As we have shown, this forum has no real connection with this litigation. It was imported here for no reason other than forum shopping."

Also see Chicago, Rock Island and Pac. Railroad Co. v. Igoe, 20 F.2d 299, 304 (7th Cir. 1955), cert. den. 350 U.S. 822 (1955) holding that judge abused discretion in refusing transfer under Section 1404(a)); Cressman v. United Air Lines, 158 F. Supp. 404, 407 (S.D. N.Y. 1958); Glenn v. Trans World Airlines, Inc., 210 F. Supp. 31 (E.D. N.Y. 1962); Morgan v. Illinois Central Railroad Co., 161 F. Supp. 119, 120 (S.D. Tex. 1958) and cases cited in 1 Moore's ed. Prac. (2nd ed. 1964) 1778, fn. 5, ¶0.145[5].

The record shows that defendant would be greatly inconvenienced by trial in Honolulu. It is axiomatic in the determination of motions under Section 1404(a) that "a plaintiff may not by choice of an inconvenient forum 'vex', 'harass', or 'oppress' the

defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy." Pepsi-Cola Co. v. Dr. Pepper Co., 214 F. Supp. 377 (W.D. Pa. 1963); Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1946); United States v. Gerber, 86 F. Supp. 175 (E.D. Pa. 1949).

3. The District Judge stated that defendant's inconvenience and expenses could be mitigated by "the availability of modern duplicating equipment and depositions" (R. 112).

This statement overlooks the self-evident facts that depositions are a poor substitute for live testimony, that defendants could hardly anticipate in pretrial depositions all of the plaintiff's case which might need rebuttal, and that defendant would necessarily incur expenses in duplication of records and shipment of them to Hawaii, which expense would be largely unnecessary if the trial were held in Seattle.

In Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 511 (1946), a leading case on forum non conveniens, the Court said:

"Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants."

In Polaroid Corporation v. Casselman, 213 F. Supp. 379, 382 (S.D. N.Y. 1962) the court was presented with the contention that transfer was unnecessary, because of the availability of deposition. The court's statement rejecting this argument applies directly here.

"Depositions, deadening and one-sided, are a poor substitute for live testimony especially where, as here, vital issues of fact may hinge on credibility. In determining credibility, there is nothing like the impact of live dramatis personae on the trier of the facts. Thus, the transfer which defendant seeks will not only serve the convenience of the witnesses but, more importantly, the ends of justice."

Also see Ford Motor Co. v. Ryan, 182 F.2d 329, 331 (7th Cir. 1950).

As for the point that defendant can copy all of its records and set up a duplicate record system in Hawaii, courts have always looked to the location of corporate books and records as an important factor in determining issues of transfer. United States v. Gerber, 86 F. Supp. 175 (E.D. Pa. 1949); and General Felt Products Co. v. Allen Industries, Inc., 120 F. Supp. 491 (D. Del. 1954). See Gulf Oil Corp. v. Gilbert, supra at page 508 ("relative ease of access to sources of proof" as an "important consideration").

Most of the foregoing cases were decided before enactment of Section 1404(a), which significantly liberalized the conditions under which transfers would be granted. In Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955), the Supreme Court held that,

"... Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience."

Where the great majority of witnesses reside, as they do in this case, 2,700 miles from the forum, and where the great majority of the records are maintained there, it would seem no

answer to a motion to transfer, that the witnesses could all be deposed and the documents duplicated. It is to prevent this very type of inconvenience and expense that Section 1404(a) was enacted

4. The District Judge stated that transfer would "further burden this foreign plaintiff who has chosen the American forum nearest its home base." (R. 112-13).

The statement of burden to "this foreign plaintiff" is based purely upon the fact that the plaintiff was incorporated in New South Wales, Australia, and the assumption that its witnesses would be coming from there. Plaintiff did not choose to file any affidavit whatsoever relating to its convenience. In similar circumstances Chief Judge Leahy said in General Felt Products Co. v. Allen Industries, 120 F. Supp. 491, 493 (D. Del. 1954):

"Plaintiff stands pat on its selection of forum.... If plaintiff chooses to stand mute, making no profert of his conveniences, or the justice impact on him, he assumes the risk of defendant's overcoming counter-choice of forum by a favorable balance of §1404(a)'s factors."

The District Judge's statement as to "burden" on the Australian plaintiff does not rest upon any showing as to the number of potential witnesses from Australia, but purely and simply upon the undeniable fact that Hawaii is a more or midway "neutral" forum. The idea of a neutral forum, strange to both parties, but midway between their places of residence, has been advanced and rejected repeatedly, on the ground that since at least one party has to travel there is no sense in making the trial equally inconvenient for both. Paragon-Revolute Corp. v. C. F. Pease Co., 120

F. Supp. 488 (D. Del. 1954); Pepsi-Cola Co. v. Dr. Pepper Co., 214 F. Supp. 377 (W.D. Pa. 1963); River Company, Inc. v. Texas Eastern Transmission Corp., 1954 Trade Cases, ¶67, 840 (S.D. N.Y. 1954); General Felt Products Co. v. Allen Industries, 20 F. Supp. 491 (D. Del. 1954).

In the Paragon case, the court said, in granting transfer from Wilmington to Chicago:

"In the case at bar the forum is neither the residence nor a place of business of either party. Both corporate parties, through counsel, officers and employees, will have to come here from foreign jurisdictions with all the documentary and physical evidence -- in the form of cumbersome physical machinery -- they deem necessary for trial. Plaintiff must travel from Rochester and defendant from Chicago. This legal ball game cannot be played in both home parks, and cannot be scheduled for Rochester because the suit could not have been brought there originally. One home field, Chicago, and neutral Wilmington remain two possibilities. As between them, I conclude conveniences favor Chicago. That is defendant's executive and manufacturing situs and will eliminate one party's travel, for plaintiff will have to travel in any event, either to Chicago or Wilmington." (120 F. Supp. at p. 490).

In the Pepsi-Cola case Judge Willson said, in granting transfer from Pittsburgh to Dallas:

"As is required under the statute, where is the convenience of the parties and witnesses in this case? Is it Pittsburgh or is it Dallas? In the first place, I have not overlooked the privilege that the plaintiff has in selecting a forum. That privilege, as Judge Murphy said, continues to play a part in deciding transfer motions. But it should not be cast in the leading role. Plaintiff has chosen to leave its own 'home grounds' so to speak. It might have gone on to Dallas, but stopped at Pittsburgh. When

inquiry was made at the first time I heard this case as to why Pittsburgh was selected, counsel for plaintiff said, "It is neutral ground". However, neutral ground plays no part in the decision unless it can be said that the interest of justice requires that the case be tried not in the state where either of the parties has its principal place of business. I take it that each party will receive a fair trial before any United States District Court. If the case were tried in Pittsburgh any business records which plaintiff would introduce from its main office would have to be transported here. It is the same for defendant. So far as the parties executive officers who may be witnesses are concerned, they must come to Pittsburgh either from New York or Dallas if the case stays here. Scheduled jet airtime from New York to Dallas is around two and one-half hours. It is one hour from New York to Pittsburgh. If plaintiff's witnesses are to leave New York, why not overfly Pittsburgh and continue on to Dallas and take their records with them." (214 F. Supp. at 382).

C. Mandamus Is An Appropriate Remedy

There is no question that this court has the power to compel action by a district court by means of a writ of mandamus. 28 U.S.C. §1651(a) provides that:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The scope of Section 1651 is stated in 6 Moore's Fed. Prac. (2d ed. 1966) 86-87, ¶54.10[4] to be as follows:

"... under §1651 a court of appeals may issue an appropriate writ, such as mandamus, prohibition, common law certiorari, habeas corpus, injunction, in aid of its exercised jurisdiction, or its then existing, or the prospective appellate jurisdiction which Congress has given it over district courts and administrative boards and agencies.

"Under the latter alternative dealing with the court's prospective appellate jurisdiction, an appropriate writ may issue to review a non-appealable interlocutory order of the district court where the court of appeals has appellate jurisdiction over a final judgment rendered in the case and it is improper to postpone review until an appeal is taken from the final judgment."

Review of a district court's order on motions under 28 U.S.C. §§1404(a) or 1406(a) is a proper application of the mandamus power. 6 Moore, supra, at 96-101, ¶54.10[4].

This court has held, consistent with the general rule, that it has power to issue writs of mandamus to review orders under 28 U.S.C. §1406(a), Gulf Research & Development co. v. Harrison, 185 F. 2d 457 (9th Cir. 1950), and 28 U.S.C. §1404(a), Shapiro v. Bonanza Hotel Co., 185 F.2d 777 (9th Cir. 1950). See American Concrete Agricultural Pipe Assn. v. No-Joint Concrete Pipe Co., 331 F.2d 706 (9th Cir. 1964).

The only difference in criteria for review of orders under Section 1406(a) and Section 1404(a) would appear to be that no discretion is invested in the District Judge in passing on a motion under the former statute. Here, the crux of the District Judge's decision was that full consideration of the motion under Section 1404(a) should be deferred. In a real sense, therefore, the Judge did not exercise his discretion. He did not apply the statutory criteria to the facts of the case. To the extent to which he could be said to have done so, he used erroneous standards and abused his discretion. There is general agreement that a decision under Section 1404(a) which shows either abuse of discretion

or is "clearly erroneous" or "arbitrary" should be reviewed on a petition for writ of mandamus. See cases cited in A. Olnick & Sons v. Dempster Brothers, Inc., 365 F.2d 439 (2nd Cir. 1966).

Appeal is not a meaningful remedy for the error involved here, since the present order is not appealable, American Concrete Agricultural Pipe Assn., supra, and appeal from a final judgment would come too late to be of any value. In granting a petition for mandamus requiring transfer, the Fourth Circuit in General Tire & Rubber Company v. Watkins, 373 F.2d 361, 370 (4th Cir. 1967), observed,

"It is obvious that if we postpone action until appeal after final judgment, the question will have become moot and the damage done....

"We are not here permitting use of mandamus as a substitute for interlocutory appeal, which is, with a few statutory exceptions, prohibited in the federal courts. See 28 U.S.C. §§1291-92. Rather, we are using the writ for a purpose for which we think it was intended - to correct a wrong to the court which otherwise can never be effectively presented on appeal. The order of the district court is reversed; the writ will be issued."

This court has held that the situation presented by this petition is a proper one for review by mandamus. In Shapiro v. Bonanza Hotel Co., supra, the court held,

"... we feel that under the particular facts of this case, and the matter being only one of form, we may properly treat this appeal as though it were a petition for a writ of mandamus. This court has power to issue the writ in aid of its

appellate jurisdiction. While it is true that the writ is an extraordinary remedy to be applied with caution we are of the opinion that sufficient grounds exist here to issue the writ if it clearly appears that the district court was in error. Appellant has made a strong showing for a change of venue under the doctrine of forum non conveniens and has raised an important question of law in regard to the circumstances under which the statutory embodiment of that doctrine may be invoked." (185 F.2d at 779).

Mandamus to correct erroneous orders relating to venue has been granted in cases very similar to the present one. In Chicago, Rock Island & Pac. R. Co. v. Igoe, 220 F.2d 299 (7th Cir. 1955), the court issued a writ of mandamus compelling transfer. The statement of controlling issues closely parallels this case.

"Factors under the statute which demonstrate that a transfer should be made are: convenience of witnesses of both plaintiff and defendant; the ease of access to sources of proof; the availability of compulsory process to compel the attendance of unwilling witnesses; the smaller amount of expense required for willing witnesses; the availability of a view of the premises; the congestion of the District Court calendar in the Northern District of Illinois, Eastern Division; that no controverted issue of fact depends upon any event that occurred in the Northern District of Illinois; and the burden of a jury trial should not be imposed upon the Northern District of Illinois, an area which has no relation to the litigation." (220 F.2d at 304).

The ground of the court's decision was that

"The balance of convenience of the parties is so overwhelmingly in favor of the defendant that we hold the denial by respondent of the motion to transfer this case to the Southern District of Iowa was so clearly erroneous that it amounted to an abuse of discretion." (id. at 305).

See also Koehring Company v. Hyde Construction Company, 324 F.2d 295 (5th Cir. 1963), in which transfer was ordered on grounds essentially identical to those in Chicago & Rock Island, supra. In each of those cases, one party resided in the district from which the action was ordered transferred; in the present case even that contact is absent. And see Southern Ry. Company v. Madden, 235 F.2d 198 (4th Cir. 1956) in which the court found abuse of discretion even though the original forum was more convenient for plaintiff's attorneys and several witnesses.

This case presents many extraordinary factors which call for the exercise of this court's power to issue mandamus. In most of the mandamus cases the choice of forum has been between two mainland cities a few hundred miles apart; here defendant would be compelled to travel 2,700 miles on or over water to defend itself. In most of the cases the choice is between the district where plaintiff resides and the home of the defendant; here Honolulu is the residence of neither. In most of the cases the forum selected by the plaintiff has some connection with the facts asserted; here concededly it has none.

VI. CONCLUSION

Plaintiff's position in resisting transfer was stated by its counsel to be as follows:

"MR. BLECHER: If it please the Court, we can strip the present motions of the legal verbiage and really take a hard look at what we're talking about. It seems to me readily apparent that we have here some maneuvering by the defendant to,

by one means or another, determine where this ball game is going to be played; and basically what is before the Court, since there isn't any way it can be played in the plaintiff's park, is for the Court to determine whether or not we're going to be forced to play in the defendant's park in Seattle ... or whether this plaintiff is going to be able to get a shot at at least a neutral park like Honolulu." (Tr. 39).

A moment later counsel for plaintiff, a San Francisco practitioner, conceded that the case "could have been started in the Northern District of California or Kansas City or anywhere else." (Tr. 40).

Thus, one is left to speculate whether what the real reason might be for selecting Hawaii. The possible justification, inadequate though it may be, that Hawaii is the American forum closest to Australia loses most of its force when one considers that a controlling interest in plaintiff is held by a Delaware corporation. Further, plaintiff might reasonably have assumed, when it entered into a Distributor's Contract with the Peterbilt Motors Company of Newark, California, a division of Pacific Car and Foundry Company, of Seattle, Washington, that if the time ever came when it needed to enforce any rights it might have under American law, that it might have to come to California or Washington.

There is no justification for retaining this case in Hawaii. What this court said about the defendant in L. D. Reeder Contractors of Arizona v. Higgins Industries, 265 F.2d 768, 776 (9th Cir. 1950) applies directly here:

"We think a consideration of these factors leads us to the inescapable conclusion that as to appellee Higgins, the 'estimate of inconvenience' weighs heavily in its favor. We need not point out again the slim thread of facts which connects Higgins with the forum state which the appellant has chosen."

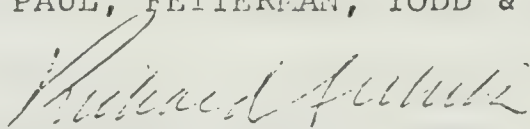
The threads which connected Higgins with the State of California were substantial indeed compared with the minimal contacts of defendant here with the State of Hawaii.

Respectfully submitted,

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NO. 22566

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PLUMBERS & FITTERS, LOCAL 761,

Appellant,

vs.

MATT J. ZAICH CONSTRUCTION CO.,

Appellee.

APPELLEE'S BRIEF

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FILED

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IN THE

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Appellee.

ERRATA SHEET
TO
APPELLEE'S BRIEF

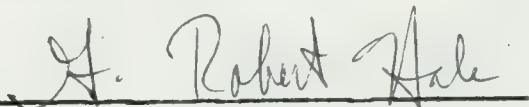
The first word of the fifth line of the second paragraph on page 27 should be changed from "Appellant" to "Appellee".

The second word of the third line of the first paragraph on page 28 should be changed from "Appellant" to "Appellee".

Respectfully submitted,

MONTELEONE & MCCRORY

By



G. ROBERT HALE

Attorneys for Appellee

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

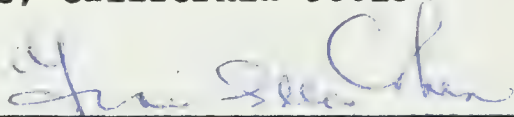
I, GRACE ELLA COHEN, being first duly sworn,
depose and say:

I am a citizen of the United States and a
resident of the county aforesaid; I am over the age of
eighteen years and not a party to the within entitled action;

My business address is 5455 Wilshire Boulevard,
Suite 1912, Los Angeles, California 90036.

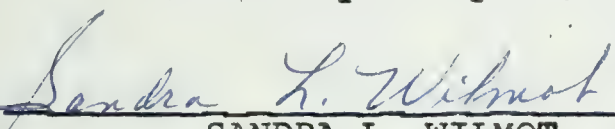
On April 12, 1968 I served the within Errata
Sheet to Appellee's Brief on the Appellant in said action,
by placing a true copy thereof enclosed in a sealed enve-
lope with postage thereon fully prepaid, in the United
States Mail at 5455 Wilshire Boulevard, Los Angeles,
California 90036, addressed as follows:

BRUNDAGE & HACKLER
CHARLES K. HACKLER
JULIUS REICH
PAUL CROST
1621 West Ninth Street
Los Angeles, California 90015



GRACE ELLA COHEN

Subscribed and sworn to before
me this 12th day of April, 1968.



SANDRA L. WILMOT

Notary Public in and for the County
of Los Angeles, State of California

My commission expires: October 18, 1969.



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NO. 22566

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PLUMBERS & FITTERS, LOCAL 761,

Appellant,

vs.

MATT J. ZAICH CONSTRUCTION CO.,

Appellee.

APPELLEE'S BRIEF

I.

STATEMENT AS TO JURISDICTION

The action below was brought by an employer, a building contractor, against a labor union for damages claimed to be due to the labor union's picketing. The United States District Court for the Central District of California had jurisdiction by reason of section 303 of the Labor Management Relations Act of 1947, as amended

29 U.S.C. 1877, and 28 U.S.C. 1331 and 1337. The case is before the United States Court of Appeals for the Ninth Circuit on appeal from a money judgment in favor of plaintiff employer in the District Court. Timely Notice of Appeal was filed by the defendant on December 5, 1967. The jurisdiction of the United States Court of Appeals arises by virtue of the provisions of 28 U.S.C. 41, 1291 and 1294.

II.

STATEMENT OF THE CASE

Appellant Plumbers and Fitters Local 761 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, herein "Plumbers Union", is an unincorporated association and labor organization in which employees participate and which exists for the purpose in whole or in part of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment and conditions of work (Finding of Fact 7).

Appellee Matt J. Zaich Construction Co. is a California corporation and is a general engineering contractor duly licensed by the State of California (Finding of Fact 1). Appellee was one of two plaintiffs for whom judgment was rendered below. Appeal has been taken only from the judgment in favor of Appellee.

Appellee is one of two corporations wholly owned by Matt J. Zaich which are used to carry on Mr. Zaich's contracting business (203/18-20 and 204/5-7).1/

The other corporation, Zaich Company, was a member of the Associated General Contractors, herein "AGC", at the time of the dispute in question (276/23-277/5).

On or about July 27, 1962 Appellee was a member of the Underground Engineering Contractors Association, herein "UECA", an employer organization organized for the purpose of negotiating labor contracts on behalf of employer members with the collective bargaining representatives of their employees (Finding of Fact 9).

At that time, Appellee as a member of the UECA had a contract with the Laborers Union covering the work on the Calleguas Water Project (266/23-267/3). Zaich Company, through its membership in the AGC, also had a contract with the Laborers Union (264/6-13). The primary difference between the two contracts was that the AGC contract provided for settlement of jurisdictional disputes by the National Joint Board for the Settlement of Jurisdictional Disputes in the Construction Industry, herein

1/ Bracketed numerals refer to page and line numbers of the transcript of the trial in the District Court. Thus, "203/18-20" refers to the testimony at page 203, lines 18-20. A citation such as "200/19-201/5" refers to the testimony at page 200, line 19 through page 201, line 5.

"NJB", while the UECA contract did not so provide (267/23-268/8).

Appellee and Zaich Company were separate legal entities, with separate business licenses, separate contractors' licenses, separate books and ledgers, separate bank accounts, separate tax returns, and separate profit sharing plans which had been separately qualified by the Internal Revenue Service (275-289). Zaich Company was a member of the AGC from 1955 to 1962 (276-277). Appellee was never a member of the AGC (285/6-8). Appellee and Zaich Company each have separate labor agreements (267/11-15).

The Plumbers Union attempted to secure an agreement from Appellee whereby its members would perform the work in question (11/20-24). Failing in this, and a subsequent attempt to secure the work through economic action (11/24-12/6), it invoked the procedures of the NJB and submitted the controversy for decision by that body (12/7-12).

Following notification to the Appellee and to the Laborers Union by the NJB that the controversy was before it for settlement and that it would hold a hearing on the dispute, Appellee sent a wire through the UECA to the NJB that it would not be bound by any determination of that Board (12/13-22). Likewise, the Laborers Union also refused to make any submission to the NJB as requested (12/23-24).

Thereupon, the NJB made a determination of the dispute based upon the matters before it, and it awarded the work to the Plumbers Union. It so notified all parties on September 28, 1962. The picketing which was the subject of the suit below was that picketing by the Plumbers Union, commencing on November 29, 1962, which had as its object that which was stated on the picket signs: That the Appellee was "not conforming with decision of NJB" (12/2-10).

As a result of this picketing, a work stoppage occurred. The picketing was for the purpose of inducing compliance with the NJB decision awarding the work to the Plumbers rather than the Laborers (13/11-14/3). In December 1962, upon the petition of the Regional Director of the National Labor Relations Board, the picketing was enjoined by the District Court under section 10(1) of the Labor Management Relations Act [29 U.S.C. 160(1)]. And on August 23, 1963, the National Labor Relations Board, in a 10(k) proceeding [29 U.S.C. 160(k)], determined that Appellee Matt J. Zaich Construction Co. was not the alter ego of Zaich Company, that Appellee therefore was not bound by any decision of the NJB and that the work was properly assigned to employees represented by the Laborers Union. 144 N.L.R.B. 133 (1963).

III.

QUESTIONS PRESENTED

1. Where Appellant has committed an unfair labor practice as defined by section 8(b)(4)(D) of the Labor Management Relations Act of 1947, must it continue to commit such practices after the N.L.R.B.'s determination before a right to recover will arise under section 303 of the Labor Management Relations Act?

2. Should the separate legal existence of Matt J. Zaich Construction Co. and Zaich Company be disregarded for the purpose of finding them to be a single entity?

3. Is the recovery of legal fees incurred by Appellee proper under the facts and the law of the case?

IV.

SUMMARY OF ARGUMENTS

1. Section 303 provides for damages to any person injured by a labor organization's conduct if such conduct is an unfair labor practice as defined by section 8(b)(4) [29 U.S.C. 158(b)(4)] of the Labor Management Relations Act.

Prior to 1959 the United States Supreme Court held that it was unnecessary to have a prior administrative decision for a cause of action to arise under section 303. In 1959 section 303 was amended and in place of the previously enumerated unfair labor practices, the unfair labor practices of section 8(b)(4) were incorporated by

reference into section 303. Since 1959 numerous cases have held that the amendment had no change on the prior decisions and that now, as prior to 1959, it is unnecessary to have a prior administrative decision for a cause of action to arise under section 303.

2. Appellee and Zaich Company are separate legal entities. There is no reason in law or fact to consider them as a single business. The trial court as well as the N.L.R.B. have held as a finding of fact that they are separate.

The Appellant itself has by its actions treated the Appellee and Zaich Company as separate legal entities.

3. The trial court found under the evidence presented that the legal fees prayed for by Appellee were in fact incurred by Appellee in the amount awarded. Such a finding should not be disturbed in the absence of a showing that it was clearly erroneous.

V.

ARGUMENTS

A. As A Matter of Law Defendant Committed An Unfair Labor Practice Within The Meaning Of Section 8(b)(4)(D) Of The Labor Management Relations Act Of 1947 And Therefore Violated Section 303 Of The Labor Management Relations Act.

It is the Appellant's contention that section 303(a)(4) read in light of section 8(b)(4)(D) renders

illegal only such picketing as takes place after and in the face of a determination by the Board that the acts complained of were unfair labor practices. Appellant is making the same argument made by the Union in the case of International L.& W.U. v. Juneau Corp., 342 U.S. 237 (1952). In the Juneau Spruce Case the International Longshoremen's and Warehousemen's Union established a picket line at a lumber mill to force the assignment of loading lumber barges to its members. The work had previously been assigned to members of the International Woodworkers of America by the employer, Juneau Spruce Corp. As a result of the picketing, the employer's lumber mill was shut down. The employer brought suit in the Federal District Court in Alaska for damages sustained as a result of the shutdown caused by the picketing. A jury awarded damages of \$750,000.00 to the employer, Juneau Spruce Corp. The Court of Appeals of the Ninth Circuit affirmed the judgment. The Supreme Court granted certiorari, and in its decision the Supreme Court construed the provisions of the Act that are here in issue.

In its appeal to the Supreme Court the Union made the identical argument as that being put forth by the Appellant in Argument A of its brief, i.e., that section 303(a)(4) read in light of section 8(b)(4)(D) renders illegal only such picketing as takes place after and in the

face of a determination by the Board that acts complained of were unfair labor practices.

In the Juneau Spruce Case the Court stated:

". . . Certainly there is nothing in the language of section 303(a)(4) which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed. Rather, the opposite seems to be true. For the jurisdictional disputes proscribed by section 303(a)(4) are rendered unlawful 'for the purposes of this section only,' thus setting apart for private redress, acts which might also be subjected to the administrative process. The fact that the Board must first attempt to resolve the dispute by means of a section 10(K) determination before it can move under section 10(b) and (c) for a cease and desist order is only a limitation on administrative power, as is the provision in section 10(K) that upon compliance 'with the decision of the Board or upon such voluntary adjustment of the dispute,' the charge shall be dismissed. These provisions, limiting and curtailing the administrative power, find no counterpart in the provision for private redress

contained in section 303(a)(4). Section 303(a)(4) as explained by Senator Taft, its author, 'retains simply a right of suit for damages against any labor organization which undertakes a secondary boycott or a jurisdictional strike.'

"The right to sue in the courts is clear, provided the pressure on the employer falls in the prescribed category which, so far as material here, is forcing or requiring him to assign particular work 'to employees in a particular labor organization' rather than to employees 'in another labor organization' or in another 'class.'"

In 1959 Congress passed the Labor-Management Reporting and Disclosure Act. In this amendment, instead of setting out the unfair labor practices at length, the statute was amended in section 303(a) to read as follows:

"It shall be unlawful, for the purposes of this section only, in any industry or activity affecting commerce, for any labor organization to engage in any practice or conduct defined as an unfair labor practice in section 158(b)(4) of this title."

Therefore, instead of having two identical sets of unfair labor practices set out in the code, we

have one enumeration of unfair labor practices in section 158(b)(4) and then their incorporation by reference in section 303(a).

In 1964, subsequent to the 1959 amendments to the Labor Management Relations Act, the Supreme Court again in the case of Teamsters Local 20 v. Morton, 377 U.S. 252 (1964), reviewed the sections that are before this Honorable Court. In the Morton Case the Supreme Court noted in the footnote at page 283:

"Certain amendments to section 303 were made by the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat 545, 29 USC (Supp. IV) section 187, but these amendments are not germane to the questions presented in this case."

At page 285, the Supreme Court stated:

"Section 303(b) of the Labor Management Relations Act expressly authorizes state and federal courts to award damages to any person injured by certain secondary boycott activities described in section 303(a). The type of conduct to be made the subject of a private damage action was considered by Congress, and section 303(a) comprehensively and with great particularity

'describes and condemns specific union conduct directed to specific objectives.'

Carpenters Local 1976 v. Labor Board, 357 US 93, 98, 2 L ed 2d 186, 1193, 78 S Ct 1011."

The Supreme Court then in footnote 13 of the herein stated proposition said:

"Section 8(b)(4), 29 USC section 158(b)(4), and section 303, 29 USC section 187, ' have an identity of language' but specify two 'different remedies.' Longshoremen v. Juneau Corp. 342 US 237, 244, 96 L ed 275, 281, 72 S Ct 235. Section 8(b)(4) provides that certain conduct constitutes an unfair labor practice for which an administrative remedy is afforded. The same conduct under section 303 also gives rise to a claim for damages cognizable in either state or federal courts. As a consequence of the 1959 amendments to the Act, section 303 now incorporates by reference the prohibitions embodied in section 8(b)(4)."

In Teamsters Local 20 v. Morton, supra, the Supreme Court in effect recognized International L. & W.U. v. Juneau Corp. as still being the law of the land.

In 1966 the United States Court of Appeals, Second Circuit, in Old Dutch Farms, Inc. v. Milk Drivers

& Dairy Emp. Union, 359 F.2d 598 (1966), had a case arising under section 303 which originated in 1962. In this case, the Union sought to induce employees of a neutral employer (a supplier of Old Dutch Farms, Inc.) to engage in work stoppages and to threaten such employer in an effort to cause such employer to cease doing business with Old Dutch Farms, Inc. In March 1965, Old Dutch Farms, Inc. brought suit against the Milk Drivers and Dairy Employees Local Union No. 584 for damages under section 303(a). The Court at page 602 stated as follows:

"The resolution of the present controversy requires (1) a determination of whether the union violated Section 8(b)(4) of the NLRA,⁷ and (2) an assessment of the actual business injuries sustained by the employer."

Footnote 7 provides as follows:

"Prior to the commencement of this action, the NLRB determined that the union had violated section 8(b)(4) of the NLRA. It should be noted, however, that a prior determination by the Board is not a prerequisite to an action by an employer under section 303. The administrative and judicial actions and remedies are viewed as

entirely independent, i.e., section 303 suits constitute a clear exception to the exclusive jurisdiction of the NLRB over alleged unfair labor practices. . ."

In 1967 in the case of Public Constructors, Inc. v. Electrical Workers (IBEW) Local 400, in the United States District Court in the District of New Jersey, 55 L.C. para 11883, the Union made the identical contention that Appellant is making before this Honorable Court. The United States District Court in New Jersey stated as follows:

"They contend that before an action can be properly instituted under Section 303 of the Labor-Management Relations Act of 1947 it is necessary to have a determination by the National Labor Relations Board that an unfair labor practice took place. To appreciate defendants' claim it is necessary to examine the statute.

"Section 303, as amended by the Landrum-Griffin Act of 1959 provides:

"'SEC. 303(a) It shall be unlawful for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor

practice in Section 8(b)(4) of the National Labor Relations Act, as amended.'

"Prior to the 1959 amendment, Section 303 set forth the entire language contained in Section 8(b)(4) of the National Labor Relations Act. As a result of the 1959 amendment -- the section was modified to incorporate Section 8(b)(4) by reference rather than repeating the language of Section 8(b)(4) in toto.

"Defendants contend that there must have been some valid reason for the amendment. They reject plaintiff's assertion that it was merely a 'scrivener's preference for abbreviated language.' Instead, defendants argue that the reason for the amendment was that Congress wanted the National Labor Relations Board to exercise its expertise before subjecting labor unions to monetary damages. . . .

"In effect, defendants are claiming that the 1959 amendment resulted in a legislative overruling of the case of International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp. . . .

"We compliment the defendants on the ingenuity of their argument; however, we

reject it. In arriving at our decision, we find it most significant that there is nothing in the legislative history accompanying the 1959 amendment which supports defendants' contention. If Congress had intended to legislatively overrule the Juneau case, we are confident that they would have so indicated. In the face of a silent record, we will not attribute to Congress an intent to reinterpret Section 303 by such subtle means. . . "

The United States District Court of New Jersey no doubt was referring to the legislative history of the Labor-Management Reporting and Disclosure Act of 1959, reported in 1959 U.S. Code Cong. Adm. News 2318, et seq., wherein this amendment is discussed in detail and nowhere is it inferred that Congress intended such a change in the law.

This argument was also rejected in Franchi Const. Co. v. Local No. 560 of Int. Hod Carriers, etc., 248 F.Supp. 131 (1965), and Taube El. Contr., Inc. v. International Bro. of E.W., L.U. No. 349, 261 F.Supp. 664 (1966).

B. Matt J. Zaich Construction Co. And Zaich Company Are Separate Corporations And No Legal Or Factual Basis Exists For Finding Them To Be A Single Enterprise.

1. In Fact and in law Matt J. Zaich Construction Co. and Zaich Company are separate legal entities. Appellant argues that Matt J. Zaich Construction Co. and Zaich Company should have been held to have been a single entity by the Court and that, if held to be such a single entity, the Appellee, Matt J. Zaich Construction Co., would be bound by the decision of the National Joint Board by Zaich Company's membership in the Associated General Contractors. These arguments were made before the National Labor Relations Board and, after reviewing the evidence, the Board determined that the two companies were in fact separate and held that the Associated General Contractors' contract was not binding on Matt J. Zaich Construction Co.

A finding of alter ego must in each case depend on the facts of that specific case. The uncontroverted facts before the trial court in this case sufficiently demonstrated the separateness of the two corporations. It was established that the two corporations were separate legal entities with separate State contractors' licenses, had separate City business licenses, had separate books and ledgers covering financial affairs, filed

separate tax returns, had separate bank accounts, had separate profit sharing plans which were separately qualified by the Internal Revenue Service, and that neither corporation had ever authorized the other to act on its behalf or to conduct business on its behalf or act as an agent on its behalf (275-289). If anything, the evidence in the record was more extensive and persuasive than that before the National Labor Relations Board when it considered the question. An analysis of the cases cited by Appellant should further demonstrate the Appellee's position.

As authority for the proposition that Matt J. Zaich Construction Co. should be bound to the National Joint Board decision by the membership of Zaich Company in the Associated General Contractors "for purposes of Federal Labor Policy", Appellant cites several cases. None of those cases, however, is based on facts like those present in the case at bar, nor do they stand for the argument Appellant seeks to make here.

The case of Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 549 (1964), is cited in Appellant's brief (page 22) for the proposition that parties may be obligated to abide by arrangements not necessarily of their own choosing. This case, however, involved a corporate merger where a successor corporation had absorbed

a predecessor corporation. The Court noted that under New York and general corporation law such a merger would not extinguish the merged corporation's obligations, but based its decision upon the factual continuity of identity of the companies.

N.L.R.B. v. Schnell Tool & Die Corpora-
tion, 144 N.L.R.B. 385 (1963), enf'd 359 F.2d 39 (6th Cir. 1966), is cited for the proposition that the N.L.R.B. has set up a standard for holding several corporations to be one. In fact, both corporations were joined before the N.L.R.B. for unfair labor practices committed by both corporations.

* A.M. Andrews Co. of Oregon v. National Labor Rel. Bd., 112 N.L.R.B. 626 (1955), enf'd 236 F.2d 44 (9th Cir. 1956), cited in Appellant's brief (page 26) is another successor case. In this instance, the successor corporation took over the assets and operations of a defunct corporation in the guise of a creditor, but without foreclosure or any other form of court action, and then attempted to deny responsibility for the predecessor's acts. This is merely another case in which a successor stepped into the shoes of a predecessor corporation while refusing to recognize its responsibility.

Pizza Products Corporation v. N.L.R.B., 369 F.2d 431 (6th Cir. 1966), enf'g 153 N.L.R.B. 1265 (1965),

cited in Appellant's brief (page 25), likewise sets no standard for all cases, but rather applied a finding of fact by the N.L.R.B. in this particular case as to the singleness of two corporate entities for jurisdictional purposes in order to take action against the employer for unfair labor acts.

N.L.R.B. v. City Yellow Cab Company, 344 F.2d 575 (6th Cir. 1965), is cited by Appellant (page 24) for the proposition that two corporations separated for tax purposes would not bar their being considered a single business in relation to federal labor policy. As admitted by Appellant, the two corporations were considered as one employer solely for purposes of establishing a jurisdictional minimum to enable the N.L.R.B. to act.

Finally, Appellant cites 21 N.L.R.B. Annual Reports 14-15 (1956) as setting a standard for treating separate corporate entities as one. An inspection of this authority reveals it sets a standard purely for jurisdictional purposes and even then notes that no one factor can be controlling.

The above cases serve only to illustrate the futility of attempting to construct, as Appellant does, an alter ego upon the specific factual elements contained in other cases. It has regularly been held that the conditions under which a corporate entity may be disregarded

necessarily vary according to circumstances in each case and that each case must be decided upon its facts. Stark v. Coker, 20 Cal.2d 839 (1942); Kohn v. Kohn, 95 Cal.App.2d 708 (1950); Automotriz, etc. De California v. Resnick, 47 Cal.2d 792 (1957); I Fletcher Cyclopedia of Corporations, pages 134, 136, 143 and 165.

Although in rare cases the separate existence of two corporations will be discarded in order to prevent or punish an unfair labor practice by the employer, in no case has the separate existence of two corporations been discarded to excuse an unfair labor practice by a union.

There has never been introduced any evidence whatever that Appellee had used the separate corporate identities to commit any acts detrimental to the Union. To the contrary, the Appellant now seeks to excuse its unfair labor practices by arguing that two separate legal entities should be treated as one.

The facts adduced at the trial by both Appellee and Appellant are entirely consistent with the nature of closely held corporations which are recognized by law and commercial practice. The closely held corporation is a unique and practical business reality and has been recognized as such. As stated in the Hastings Law Journal:

"Once the limited liability concept is justified it should not be disregarded because of the mere fact that the shareholders are few in number, or that they perform all the corporate functions without conforming to corporate formalities, or that they are in a 'unity of interest' with the corporation. . . . It should be the character of the transaction rather than the character of the corporation upon which shareholder liability is based."

Oppenheim, The Close Corporation in California - Necessity of Separate Treatment, 12 Hastings Law Journal 227, 231 (1961).

Nothing has been introduced which would make applicable the doctrine of alter ego under the principles followed by the courts.

The cases cited by Appellant itself make it clear that piercing the corporate veil is not the automatic result of the normal relationships by closely held corporations, but the courts' specific equitable device to prevent an injustice resulting from an instance of the improper use of the corporate entity. It is a remedy applied to prevent a grave injustice. Dashew v. Dashew Bus. Machines, 218 Cal.App.2d 711 (1963).

This idea has been stated in many cases in the form of two requirements for the finding of an alter ego.

". . . It has been stated that the two requirements for application of this doctrine are (1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow."

Automotriz, etc. De California v. Resnick, 47 Cal.2d 792 (1957); Minifie v. Rowley, 187 Cal. 481 (1921).

On such a rational basis it is not difficult to see how cases such as Schnell, Pizza or A. M. Andrews, where an employer commits unfair labor practices against a union and then seeks to hide behind a corporate shield arrived at their decision. But none of these factors is present here. It is not enough that a party has been damaged or that a finding of alter ego would give him the relief he seeks, even where there is close relationship between entities. Associated Vendors, Inc. v. Oakland Meat Co., 210 Cal.App.2d 825 (1962). In each of the cases cited applying the doctrine, the Court has found a course of dealing intended and organized for the purpose of improperly defeating the outsider and causally related to his predicament or the injustice complained of. Various types of improper use of corporate entity are shown by the

cases holding alter ego to apply, but in each there is a relationship between the improper dealing and the outsider's predicament. This element was made clear by the Court in Carlesimo v. Schwebel, 87 Cal.App.2d 482 (1948).

It is submitted that Appellant seeks a curious misapplication of the doctrine of alter ego. Starting with the desired result -- that the Appellee be found bound by the National Joint Board decision -- it has listed and analyzed a long list of the ties between two separately organized corporations. Although these ties existed long before the dispute or the facts in question, are in themselves the normal and practically inevitable concomitants of operating closely held, commonly owned, separate corporations, and although they have no causal relation to the injustice alleged, they are somehow given sinister significance when combined and recited seriatim.

As for the method and type of incorporation, capitalization and management of the two corporations owned by Mr. Zaich, each and every one of the factors argued by Appellant (Appellant's Brief, pages 23-29) are the entirely proper and common result of the single ownership of separate closed corporations. Indeed this method of operation with multiple corporations is quite widely used in construction corporations for reasons entirely unrelated to labor agreements. Use of a single office,

lease of equipment, common directors and officers, single ownership, separate licenses (as required by law), use of the same persons at different times as employees on the payroll of one or the other corporations, personal guaranties by the sole stockholders of all corporate debts, allocation of debts and credits between corporations and control by the chief executive officer of labor as well as other policy matters have not been and could not be seriously challenged as improper per se. As a matter of fact, all of these factors were present as a matter of general practice of the corporations years before the conflict with the Appellant arose. Further, they have no causal relationship with the legal reality of which the Appellant complains: -- That the Appellee, a corporation, was not a member of the Associated General Contractors or subject to the National Joint Board ruling.

Finally, Appellant has argued that the trial court's finding of fact that Zaich Company was not the alter ego of Matt J. Zaich Construction Co. (Appellant's Brief, page 29) should be treated as a conclusion of law. This position is refuted by Appellant's own cases. In Yellow Cab, the N.L.R.B. upheld the trial examiner's finding of fact that the two corporations should be treated as one. In both Pizza Products and A. M. Andrews the Court upheld the N.L.R.B.'s finding of fact that the two corporations should be treated as one.

The trial court has weighed the evidence and concluded as a finding of fact that Matt J. Zaich Construction Co. was not the alter ego of the Zaich Company. This finding, therefore, should not be set aside unless it was clearly erroneous. Rules of Civil Procedure for the United States District Courts, Rule 52.

2. The Appellant treated Matt J. Zaich Construction Co. and Zaich Company as separate entities. Zaich Company was a member of the AGC (276-277). As a member of the AGC, Zaich Company was bound to the Master Labor Agreement (267/20-22). Appellant, as a member of the Central Trade Council, was therefore a party to a contract with Zaich Company. Appellee was the employer on the jobsite; yet, despite this prior contract, Appellant came to the jobsite and sought, unsuccessfully, to get Appellee to sign a separate contract with it (Stipulation of Fact 6). If, as Appellant contends, Appellee is the alter ego of Zaich Company, why did Appellant seek a separate contract with it? By its own conduct, Appellant Union has treated Appellee Matt J. Zaich Construction Co. and Zaich Company as separate employers. This is consistent with Appellee's and Zaich Company's policies of separate labor agreements for each company (267/11-15).

C. The Court Properly Awarded As Damages The
Legal Fees Expended By Matt J. Zaich Construction Co.

The evidence is undisputed that the law firm of Hill, Farrer & Burrill was paid \$12,951.64 in legal fees and costs resulting from picketing by Appellant and the ensuing legal processes before the United States District Court and the National Labor Relations Board. Of this sum, one-third was paid by the Zarubica Company (a co-plaintiff in the action in the trial court), one-third was paid by UECA and one-third was paid by Appellee (Plaintiff's Exhibits "1" and "2").

Appellant has argued that there was "no evidence of any work performed by attorneys hired by Appellee in securing an injunction to enjoin the picketing." (Appellant's Opening Brief, page 31). Witnesses for Appellant testified that there was no United States attorney present at the 10(k) proceeding, and that each Union and each charging party were represented by their own counsel (145/11-21).

The Court may take judicial notice of the opinion of the National Labor Relations Board in the 10(k) proceeding when it stated that:

"Briefs filed by the employers,
the Laborers, and the Associated General Contractors have been duly considered."

144 N.L.R.B. at 134.

This indicates that the Government did not even file a brief in this matter and that the attorneys for Appellant and Zarubica Company were doing the actual presentation of evidence in the presenting of the case before the National Labor Relations Board.

Appellant further argues that legal fees involved in the handling of a section 10(k) hearing are not recoverable (Appellant's Opening Brief, page 32). Appellant can cite no case to support this contention. To the contrary, in fact, section 303 of the Labor Management Relations Act of 1947, subparagraph (b), provides that:

"Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

It is true that some legal fees would be for the 10(k) hearing. However, this hearing was part and parcel of the entire controversy.

The Court is respectfully asked to take judicial notice of the court file in the injunction

proceeding, No. 62-1623-CC. The temporary restraining order signed by Judge Carr on February 4, 1963 (as well as the Judge's prior restraining order on December 18, 1962) does not stand alone, but was specifically conditioned upon and required the Appellee to proceed to a final determination by the National Labor Relations Board as a condition to the continuance of the restraining order.

Judge Carr's order at page 2, lines 24-26, states that Appellant was "enjoined and restrained pending final disposition of the matters herein involved now pending before the N.L.R.B.", and again at page 3, lines 21-26:

"It is further ordered that this case remain open on the docket of this court pending final disposition of the matters involved herein pending before the National Labor Relations Board and that upon final disposition of said matters by the said Board and upon compliance by respondents with the terms, provisions and obligations of the within order petitioners shall cause this proceeding to be dismissed."

It is thus submitted that the restraining order was inextricably tied to the N.L.R.B. proceeding and that Appellee had no choice but was, in effect, ordered by the Court to proceed to a final determination by the National Labor Relations Board and thereafter upon final

determination and compliance to dismiss the injunction proceeding. This was done as ordered and the dismissal was signed by Judge Hall on November 19, 1963.

Had Appellee secured an unqualified restraining order and then voluntarily incurred additional expenses in securing a determination not necessary to keep the job open, Appellant's argument might have some reality. Such was not the case here and the order itself makes clear that the further proceedings were ordered and required for the effectiveness of the restraining order and that Appellee should be repaid for the expenses therein incurred.

Appellate Courts have repeatedly ruled that attorneys' fees actually spent by a plaintiff in removing the picket line and in proceedings before the National Labor Relations Board in prosecuting an unfair labor practice charge are recoverable in a "303 action". Aircraft and Engine Maintenance, etc. v. I. E. Schilling Co., 340 F.2d 286 (5th Cir. 1965); Construction and Gen. Lab. Loc. U. No. 438 v. Hardy Eng. & Const. Co., 354 F.2d 24 (5th Cir. 1965); Local Union 948, Int. Bro. of Teamsters, etc. v. Humko Co., 287 F.2d 231 (6th Cir. 1961). In Gulf Coast Bldg. & Const. Tr. Coun. v. F. R. Hoar & Son, Inc., 470 F.2d 746 (1967), the Court, in allowing the recovery of attorneys' fees incurred in filing an unfair labor practice action with the National Labor Relations Board, said:

"The attorney fees to which appellants object are those which appellee sustained in removing appellants' pickets and, as such, were proper items of damages. The contention that such fees are not allowable is wholly without merit."

VI.

CONCLUSION

Based on the foregoing, the Record on Appeal and matters of which this Court may take judicial notice, the judgment of the District Court should be sustained.

Respectfully submitted,

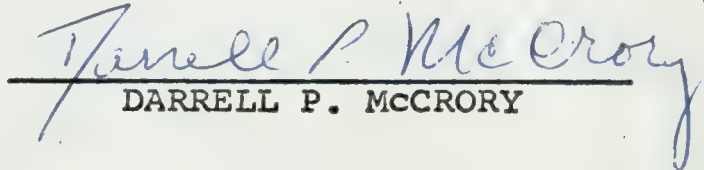
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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.



DARRELL P. MCCRORY

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, GRACE ELLA COHEN, being first duly sworn,
depose and say:

I am a citizen of the United States and a
resident of the county aforesaid; I am over the age of
eighteen years and not a party to the within entitled action;

My business address is 5455 Wilshire Boulevard,
Suite 1912, Los Angeles, California 90036.

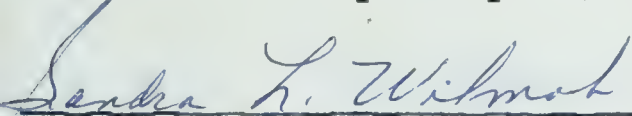
On April 11, 1968 I served the within Appellee's
Brief on the Appellant in said action, by placing a true
copy thereof enclosed in a sealed envelope with postage
thereon fully prepaid, in the United States Mail at 5455
Wilshire Boulevard, Los Angeles, California 90036, addressed
as follows:

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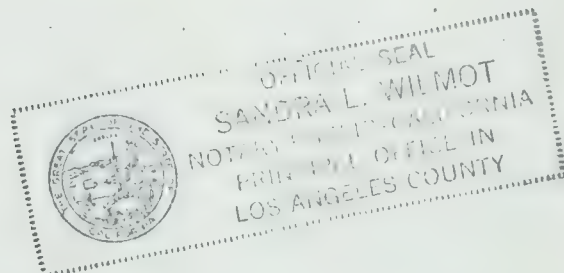
Subscribed and sworn to before
me this 11th day of April, 1968.



SANDRA L. WILMOT

Notary Public in and for the County
of Los Angeles, State of California

My commission expires: October 18, 1969



No. 22566

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PLUMBERS & FITTERS, LOCAL 761,

Appellant,

vs.

MATT J. ZAICH CONSTRUCTION Co.,

Appellee.

APPELLANT'S OPENING BRIEF.

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| Labor Management Relations Act of 1947, Sec. 303 | 1, 5, 6, 7, 8, 16, 18, 19 |
| Labor Management Relations Act of 1947, Sec. 303(a) | 7, 12, 14, 15, 16 |
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No. 22566

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PLUMBERS & FITTERS, LOCAL 761,

Appellant,

vs.

MATT J. ZAICH CONSTRUCTION CO.,

Appellee.

APPELLANT'S OPENING BRIEF.

I.

STATEMENT AS TO JURISDICTION.

The action below was brought by an employer, a building contractor, against a labor union for damages claimed to be due to the labor union's picketing. The United States District Court for the Central District of California had jurisdiction by reason of section 303 of the Labor Management Relations Act of 1947, as amended [29 U.S.C § 187], and 28 U.S.C. §§ 1331 and 1337. The case is before the United States Court of Appeals for the Ninth Circuit on appeal from a money judgment in favor of plaintiff employer in the District Court [R. A. 71].¹ Timely Notice of Appeal was filed by the defendant on December 5, 1967. The

¹"R. A." designates "Record on Appeal" and numerals indicate page references therein.

jurisdiction of the United States Court of Appeals arises by virtue of the provisions of 28 U.S.C. §§ 41, 1291 and 1294.

II.

STATEMENT OF THE CASE.

Appellant Plumbers and Fitters Local 761 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, herein “Plumbers Union,” is an unincorporated association and labor organization in which employees participate and which exists for the purpose in whole or in part of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment and conditions of work [Finding of Fact 7, Findings of Fact and Conclusions of Law, R. A. 64].

Appellee Zaich Construction Co. is a California corporation and is a general engineering contractor duly licensed by the State of California [Finding of Fact 1, R. A. 64]. Appellee was one of two plaintiffs for whom judgment was rendered below. Appeal has been taken only from the judgment in favor of Appellee [R. A. 71].

Appellee is one of two corporations wholly owned by Matt J. Zaich which are used to carry on Mr. Zaich’s contracting business [203/18-20 and 204/5-7].² Zaich Company, the other corporation, owns all the real property and assets of the business [238/17-239/5] and

²Bracketed numerals refer to page and line numbers of the transcript of the trial in the District Court. Thus, “203/18-20” refers to the testimony at page 203, lines 18-20. A citation such as “200/19-201/5” refers to the testimony at page 200, line 19 through page 201, line 5.

was a member of the Associated General Contractors, herein "AGC," at the time of the dispute in question [276/23-277/5].

On or about July 27, 1962 Appellee was a member of the Underground Engineering Contractors Association, herein "UECA," an employer organization organized for the purpose of negotiating labor contracts on behalf of employer members with the collective bargaining representatives of their employees [Finding of Fact 9, R. A. 64-65].

At that time Appellee, as a member of the UECA, had a contract with the Laborers Union covering the work on the Calleguas Water Project [266/23-267/3]. Mr. Zaich, through Zaich Company's membership in the AGC, had another contract with the Laborers Union [264/6-13]. The primary difference between the two contracts was that the AGC contract provided for settlement of jurisdictional disputes by the National Joint Board for the Settlement of Jurisdictional Disputes in the Construction Industry, herein "NJB," while the UECA contract did not so provide [267/23-268/8].

Mr. Zaich, as the sole owner of both corporations, directed the business and labor relations of each corporation [225/16-20]. He bid on a particular job under the name of either corporation depending on the advice of his business manager [212/9-25]. The credit for Appellee's loans was based on the joint credit of the two companies and Zaich personally [243/5-244/4]. The two corporations shared the same offices and office staff [225/10-15]. Employees were interchanged between corporations [221/20-23], and Appellee used Zaich Company's equipment with only a yearly book-keeping entry being made for such use [214/4-20].

The foregoing statement of facts is based upon the uncontradicted evidence produced by or through Appellee's witness, Matt J. Zaich. The following statement of the facts of the dispute and work stoppage is based on a stipulation of the parties at trial.

The Plumbers Union first attempted to secure an agreement from Mr. Zaich whereby its members would perform the work in question [11/20-24]. Failing in this attempt, and its subsequent attempt to secure the work through economic action [11/24-12/6], it invoked the procedures of the NJB and submitted the controversy for decision by that body [12/7-12].

Following notification to the Appellee and to the Laborers Union by the NJB that the controversy was before it for settlement and that it would hold a hearing on the dispute, through the UECA Appellee sent a wire to the NJB that it was not bound by any determination of that Board [12/13-22]. Likewise, the Laborers Union also refused to make any submission to the NJB as requested [12/23-24].

Thereupon the NJB made a determination of the dispute based upon the matters before it, and it awarded the work to the Plumbers Union. It so notified all parties on September 28, 1962. The picketing which was the subject of the suit below was that picketing by the Plumbers Union, commencing on November 29, 1962, which had as its object that which was stated on the picket signs: That the Appellee was "not conforming with decision of NJB" [12/2-10].

As a result of this picketing, a work stoppage occurred. The picketing was for the purpose of inducing compliance with the NJB award [13/11-14/3]. In December 1962, upon the petition of the Regional Director of the National Labor Relations Board, the picketing was enjoined by the District Court under section 10(1) of the Labor Management Relations Act [29 U.S.C. § 160(1)]. And on August 23, 1963, the National Labor Relations Board, in a 10(k) proceeding [29 U.S.C. § 160(k)], determined that the work was properly assigned to employees represented by the Laborers Union. 144 N.L.R.B. 133 (1963).

III.

QUESTIONS PRESENTED.

1. Can there be a violation of section 303 of the Labor Management Relations Act, as amended [29 U.S.C. § 187] based on section 8(b)(4)(D) of the Act [29 U.S.C. § 158(b)(4)(D)], where Appellant complied with and did not violate the NLRB's determination of the underlying dispute?

2. In light of the national labor policy, should Appellee be considered to be a single employer with Zaich Company and, therefore, be barred from recovering damages for its own violation of an arbitral award?

3. Is recovery of legal fees allegedly incurred by Appellee for (1) the filing of unfair labor practice charges, (2) the securing of an injunction to remove the picket line, and (3) participation in the 10(k) hearing proper under the facts and the law of the case?

IV.

SPECIFICATION OF ERRORS.

The judgment of the District Court in favor of Appellee should be reversed because the District Court has committed the following errors, each of which constitutes legal basis for such reversal. Based on uncontradicted evidence presented by the Appellee, the lower court erred in making the following findings of fact and conclusions of law as they are contrary to the undisputed facts and the national labor policy:

1. The finding contained in Finding of Fact 15 to the effect that Zaich was not a party to any agreement providing for arbitration of jurisdictional disputes by the NJB.

2. The finding contained in Finding of Fact 19 to the effect that Zaich Company was not the *alter ego* of Zaich Construction Company.

3. The finding contained in Finding of Fact 21 to the effect that because of the shutdown from November 30, 1962 to December 17, 1962, Appellee incurred legal fees for injunction matters in the sum of \$4,317.21 or in any other sum.

4. The conclusion contained in Conclusion of Law 3 to the effect that Appellee was not bound by or subject to any ruling of the NJB affecting the assignment of work which had been made to the Laborers Union.

5. The conclusion contained in Conclusion of Law 5 to the effect that the picketing by the Plumbers Union was an unfair labor practice within the meaning of section 303 of the Labor Management Relations Act of 1947 and that the Plumbers Union violated section 303.

6. The conclusion contained in Conclusion of Law 7 to the effect that the attorney's fees were legally recoverable items of damage.

7. The conclusion contained in Conclusion of Law 8 to the effect that Appellee is entitled to judgment against the Plumbers Union in the sum of \$19,443.96, or in any other sum.

V.

SUMMARY OF ARGUMENTS.

1. Section 303 provides for damages to any person injured by a labor organization's conduct if such conduct is an unfair labor practice within the meaning of section 8(b)(4) [29 U.S.C. § 158(b)(4)] of the Act. However, before a union's conduct can be found to violate the jurisdictional dispute provision of section 8(b)(4)(D) (the section involved in this case), the NLRB must hold a hearing pursuant to section 10(k) [29 U.S.C. § 160(k)] and make a determination of the dispute. *Only if the losing union violates that determination will there be found a violation of section 8(b)(4)(D).* Because there was no violation in this case of the NLRB's determination, there can be found no violation of section 8(b)(4)(D), and consequently no violation of section 303.

It was not, however, always so. Prior to 1959, section 303(a) contained its own definition of conduct which was unlawful and redressible through a damage action. In 1959, Congress amended section 303(a) to read, in relevant part, as follows:

"It shall be unlawful . . . for any labor organization to engage in any activity or conduct *defined as an unfair labor practice in section 8(b)(4)* . . ."
(emphasis added).

Thus, at least since 1959 a violation of section 303 could be shown only by showing a violation of section 8(b)(4). And since there was here no violation of section 8(b)(4), neither is there a violation of section 303.

2. Appellee was one of two corporations wholly owned and dominated by Matt J. Zaich and used by him to carry on his single business enterprise of underground contracting. Mr. Zaich, through his Zaich Company, was a member of the AGC, which membership bound him to the NJB. Both the Plumbers Union and the Laborers Union were bound to the NJB as well.

Because of the inter-relationship of Matt Zaich's corporate entities, the two corporations, for the purposes of national labor policy should be considered as one employer; and as a single employer carrying on a unitary business enterprise, Appellee was bound to the arbitral determination of the NJB.

A union may use economic action to secure compliance with arbitration awards, including the awards of the NJB. Since the picketing was for this purpose, it did not violate section 303 of the Act.

3. Appellee's recovery of legal fees for the filing of unfair labor practice charges is unsupported by the evidence. It was affirmatively shown that Appellee's attorneys did not perform at least part of the tasks for which it claims legal fees and such fees are not, therefore, recoverable.

Recovery of legal fees for securing an injunction is unsupported by the evidence. The injunction was secured by the government, not by Appellee.

There is no basis in law for recovery of legal fees incurred as a result of participation in a 10(k) proceeding.

Appellee's recovery of legal fees is improper for the additional reason that such items of expense, if incurred at all, were capable of certain proof and were not so proved; rather, Appellee merely claimed a lump sum for all legal fees. Since one or more of the items was improper, the Court could not have ascertained what part of the total fee was allocable to the item or items for which recovery was contrary to law. Therefore, the Court should disallow Appellee's recovery for legal fees in any sum.

VI. ARGUMENTS.

A. AS A MATTER OF LAW, THERE WAS NO UNFAIR LABOR PRACTICE WITHIN THE MEANING OF SECTION 8(b)(4)(D); THEREFORE, NO VIOLATION OF SECTION 303 OCCURRED.

1. The Historical Background of Legislation Concerning Jurisdictional Strikes.

In order to properly place into perspective the problems of jurisdictional disputes, some brief review of the interrelation of the various federal labor laws is essential.

Prior to 1932 the federal judiciary was deeply embroiled in the business of issuing and enforcing injunctions in labor disputes. See Frankfurter & Greene, *The Labor Injunction* (1930). To counter this Congress enacted the Norris-La Guardia Act, 47 Stat. 70 (1932) [29 U.S.C. §§ 101-15], which, in essence, states that "no court of the United States . . . shall have jurisdiction to issue any restraining order or . . . injunction in a case involving or growing out of a labor dispute . . ." 29 U.S.C. § 104.

In 1935 the Wagner (National Labor Relations) Act was passed, 49 Stat. 449 (1935) [29 U.S.C. §§ 151-66], proscribing, in section 8 [29 U.S.C. § 158], five types of employer conduct which were denominated as unfair labor practices. Not only was there no union-proscribed conduct in the Wagner Act, but in section 7 [29 U.S.C. § 157] employees were affirmatively given the right to engage in concerted (strike) activity, and any peaceful conduct was condoned, regardless of the economic injury imposed. This was in sharp distinction to pre-Norris-La Guardia and Wagner

Act days when the presumption appeared to be that strikes and their attendant injuries were unlawful.

As a result of the almost absolute ban on restraints on picketing, on an occasion when a jurisdictional dispute erupted between the Carpenters Union and the Machinists, in an attempt to terminate the ensuing strike the anti-trust laws were invoked and a criminal indictment was brought against the officers of the picketing union. The Supreme Court was presented with the problem of resolving an apparent conflict between the Norris-La Guardia Act, which permitted economic injury, and the Sherman Act, which prohibited it. The Court resolved the conflict between these two laws by holding that no violation of the Sherman Act could be sustained where the union engaged in conduct which was immune under the Norris-La Guardia Act from injunctive relief. The wide range of laws relating to labor, said the Court, must be read together; and that which is permitted under one law may not be interdicted under another. *United States v. Hutcheson*, 312 U.S. 219, 234-36 (1941); cf. *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689 (1965) ("exemption for union-employer agreements is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws").

This policy prevailed until 1947, when Congress examined the lack of restraints on labor unions and passed the Taft-Hartley (Labor Management Relations) Act, 61 Stat. 136 (1947) [29 U.S.C. § 141], which counterbalanced the five employer unfair labor practices with six union unfair labor practices (see 29 U.S.C. §§ 158[b][1] through [6]). Two additional

union unfair labor practices were added by the enactment in 1959 of the Landrum-Griffin (Labor-Management Reporting and Disclosure) Act, 73 Stat. 519 (1959) (see §§ 8[b][7] and 8[e] [29 U.S.C. §§ 158-(b)(7) and 158(e)]).

Even in 1947, however, when Congress was legislating against unions, it nonetheless carefully provided a remedy in damages for only one of the six newly-created union unfair labor practices. Only for a section 8(b)(4)-type violation did damages flow. See section 303(a) of Taft-Hartley Act. For the other five unfair labor practices there was no redress, other than that provided by the National Labor Relations Board. Indeed, at the same time it was thus restricting unions, Congress specifically provided in section 13 [29 U.S.C. § 163] that “nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike . . .”; and in a proviso to section 8(b)(4) employees were told that nothing in the Act made it unlawful for them to honor a picket line.

This concept was reinforced by judicial decisions which held that,

“the detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the National Labor-Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. *Otherwise, it is implicit in the Act that the public interest is served by freedom of*

labor to use the weapon of picketing.” Garner v. Teamsters, 346 U.S. 485, 499-500 (1953) (emphasis added).

In other decisions, the Supreme Court ruled that where a union’s activities are *arguably* either protected or prohibited by the Act, the power of courts to award monetary or equitable relief for redress as a result of damages incurred because of concerted activities is displaced by the exclusive jurisdiction of the National Labor Relations Board. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). And even when the Board attempted to regulate the *manner* in which lawful picketing could be conducted, the Board was rebuked by the Court for going outside the Congressional mandate. See *NLRB v. Insurance Agents’ Union*, 361 U.S. 477, 498 (1960).

In 1959, when Congress added still two more union unfair labor practices, it took pains not to add additional remedies in the form of damages. (This is especially interesting in light of the fact that one of the additional unfair labor practices—a prohibition on organizational and recognitional picketing [§ 8(b)(7) (29 U.S.C. § 158[b][7])]—was considered by some as a particularly egregious type of activity. For example, President Eisenhower, in his request for Congressional action in this field, specifically singled out such picketing as wrongful. See Comment, 9 U.C.L.A. L. Rev. 666 n.3 and preceding text (1962).

The sum, then, of this historical review is to demonstrate with what precision Congress has legislated when it desired to infringe upon the right to engage in concerted activities. At least since 1932, it has been the

norm for employees to be permitted to strike and picket regardless of the economic impact.³ And even where such conduct is condemned, it is only in the *unusual* case where damages are recoverable.

2. The Interrelationship Between Section 8(b)(4)(D) and Section 303.

a. *Under the Taft-Hartley Act*—One of the Union unfair labor practices of the 1947 Taft-Hartley Act was contained in section 8(b)(4)(D) [29 U.S.C. § 158(b)(4)(D)], and it related to picketing by unions for the purpose of forcing or requiring an employer to change an assignment of work (commonly referred to as a jurisdictional strike). Also enacted at this time was section 10(k) [29 U.S.C. § 160(k)], which requires the National Labor Relations Board, upon the filing of a charge by any person alleging a violation of section 8(b)(4)(D), to hear and determine the dispute which gave rise to the unfair labor practice charge, unless the parties have themselves agreed upon a method of settlement. Assuming that the Board will determine the dispute, section 10(k) continues:

“Upon compliance by the parties to the dispute with the decision [under 10(k)] of the Board . . . *such charge shall be dismissed.*” (Emphasis added).

Prior to the 1959 amendments to the Taft-Hartley Act, section 303(a) (under which the present suit is

³In California, for example, the infliction of economic injury in the course of a labor dispute, so long as a trade union purpose is being served, is privileged. See *Petri Cleaners, Inc. v. Automotive Employees*, 53 Cal.2d 455, 469 (1960) (California’s policy favors “free interaction of economic forces”); *Imperial Ice Co. v. Rossier*, 18 Cal.2d 33, 35 (1941). An attempt to outlaw the secondary boycott and “hot cargo” was held unconstitutional. In *re Blaney* 30 Cal.2d 643, 650-53 (1947).

brought) made it unlawful for a labor organization to engage in certain enumerated conduct, and subsection (b) gave a private cause of action to “whoever shall be injured . . . by reason of any violation of subsection (a).”

For the purposes of this argument, the important point with respect to section 303(a) prior to its amendment in 1959, is that it specifically set forth each type conduct for which damages were recoverable, albeit the enumeration was in substantially identical language to that contained in section 8(b)(4) of the Act. The difference, according to an early Supreme Court case, was that “section 8(b)(4)(D) gives rise to an administrative finding; § 303(a)(4), to a judgment for damages.” *International Longshoremen’s Union v. Juneau Spruce Corp.*, 342 U.S. 237, 243-44 (1952).

In *Juneau Spruce*, the union had argued that section 303(a)(4) should be read in light of section 8(b)(4)-(D), which makes unlawful only such picketing as takes place *following* a determination by the Board that there were unfair labor practices committed (see last sentence of section 10[k], which requires a dismissal of unfair labor practice charges if there is compliance with the Board’s determination). “If that conclusion is warranted,” said the Court, “there must be a reversal here since the damages . . . accrued prior to the decision of the Board, under § 10(k) of the Act, that petitioners had committed an unfair labor practice within the meaning of § 8(b)(4)(D).” *Juneau Spruce*, 342 U.S. at 234. The Court, however, refused to accept this argument, primarily because

“there is nothing in the language of § 303(a)(4) which makes its remedy dependent on any prior ad-

ministrative determination that an unfair labor practice has been committed.” *Juneau Spruce*, 342 U.S. at 244.

b. *The Landrum-Griffin amendments of 1959*—The above quoted language from *Juneau Spruce* points up the essence of the argument: by reason of the 1959 amendments, to paraphrase the foregoing quotation from *Juneau Spruce*, there now is language in section 303 which makes its remedy dependent upon a prior administrative determination. That language is as follows: “It shall be unlawful . . . for any labor organization to engage in any activity or conduct *defined as an unfair labor practice* in section 8(b)(4). . . .” (Emphasis added).

In other words, in 1959 Congress deleted the enumeration of unlawful conduct which had been contained in section 303(a), and opted for an incorporation by reference of section 8(b)(4). This being so, the statutory scheme of section 8(b)(4)(D) and section 10(k) must have been intended to go along with that incorporation by reference and is, therefore, applicable to the present case.

Thus, the entire statutory scheme which comes into play when there is a charged violation of section 8(b)(4)(D) is this: Under section 10(1) [29 U.S.C. § 160(1)], in situations where it is appropriate an immediate investigation is conducted by the Board, which takes priority over all other cases in the office where the charge has been filed. If after the investigation the officer or regional attorney of the Board to whom the matter was referred has reasonable cause to believe that the charge is true, “he *shall*” petition the appropri-

ate United States District Court for injunctive relief.⁴ The Board is then directed to hear and determine the dispute out of which the charge arose. Again, as with the Congressional mandate to seek an injunction, the holding of a hearing and determination of the dispute is mandatory. *Radio & Television Broadcast Eng'rs v. NLRB*, 364 U.S. 573, 577 (1961).

It is a complete defense to an unfair labor practice charge under section 8(b)(4)(D) that the work which the picketing union sought to have assigned to it is determined by the Board properly to have been within the ambit of that union's jurisdiction, since at that stage, in the words of section 8(b)(4)(D), the employer would be "failing to conform to an order . . . of the Board determining the bargaining representative for employees performing such work," and under the "unless" clause of 8(b)(4)(D), there would be no violation of the Act.

Finally, a complaint will *only* issue "if the union which is the loser in a Sec. 10(k) proceeding fails to comply with the determination of the Board." *Dooley v. Highway Truckdrivers*, 182 F. Supp. 297, 304 n.9 (D. Del. 1960). There can, therefore, be no unfair labor practice unless there is first, a 10(k) hearing, and second, *non-compliance with the Board's determination*. See *Bechtel Corp.*, 112 N.L.R.B. 812,

⁴Cf. *Retail Clerks Union v. Food Employer Council, Inc.*, 351 F.2d 525, 528 (9th Cir. 1965): "Section 10(1) is mandatory, not discretionary in nature and requires the Regional Director to seek injunctive relief. . . ." Such an injunction is sought under section 8(b)(4)(D) even before a determination has been made that a violation in fact exists. See *Dooley v. Highway Truckdrivers*, 182 F. Supp. 297, 303-04 (D. Del. 1960).

813-15 (1955); *Los Angeles Bldg. Trades Council*, 88 N.L.R.B. 1101 (1950).⁵

During the period that the dispute is being determined, the union which had been picketing may be under injunction. The work may continue to be performed in accordance with the employer's assignment, and in many instances the work is completed by the time the 10(k) hearing has been concluded. Therefore, even if the picketing union is determined to be entitled to work, it is small solace to it and to its members.

Nevertheless, the statutory scheme has been so devised, and it has been passed upon by the Supreme Court. "It is more important to industrial peace," said the Court, "that jurisdictional disputes be settled permanently *than it is that unfair labor practice sanctions for jurisdictional strikes be imposed upon unions.*" *NLRB v. Radio & Television Broadcast Eng'rs Union*, 364 U.S. 573, 577 (1961) (emphasis added).

Thus, since the 1959 amendment to section 303 incorporated the statutory scheme of section 8(b)(4)(D), both the burdens and the benefits of that scheme must be borne by Appellee. Had the Plumbers' claim to the disputed work been determined by the Board to be valid, Appellee would nonetheless have secured the benefit of having had the work performed according to its original assignment because of the protection against picketing afforded it by the injunction issued under section 10(1). By the time the Board acted, the work would have been complete. To tell the Plumbers Union at that time that the Board was wrong in securing the

⁵In *Public Constructors, Inc. v. Local 400 IBEW*, 65 L.R.R.M. 2291 (D.C. N.J. 1967), the Court rejected this construction of section 303.

injunction is, of course, meaningless; however, it is in accordance with the statutory plan with which the parties must comply.

To permit any other interpretation of section 303 would be to write out of the Act the defenses that are permitted by section 8(b)(4)(D), among which is the defense that the picketing union has agreed to comply with the Board's determination.⁶

B. AS ZAICH CONSTRUCTION CO. AND ZAICH CO. CONSTITUTE A SINGLE EMPLOYER, ZAICH CONSTRUCTION CO. IS BOUND BY THE JURISDICTIONAL DETERMINATION OF THE NATIONAL JOINT BOARD AND, THEREFORE, NO UNFAIR LABOR PRACTICE WAS COMMITTED.

1. The National Joint Board for the Settlement of Jurisdictional Disputes in the Building and Construction Industry.

Shortly following the passage of the Taft-Hartley Act, employers and labor organizations in the building and construction industry created the National Joint Board for Settlement of Jurisdictional Disputes in the Building and Construction Industry. See *Armco Drainage & Metal Prods. Inc.*, 137 N.L.R.B. 1753, 1756 (1962). The creation of the NJB was at the urging of Congress, as demonstrated by section 10(k) [29 U.S.C. § 160(k)] of the Act. Section 10(k) directs the National Labor Relations Board to "hear and determine" jurisdictional disputes unless the parties have "agreed upon methods for the voluntary adjustment" of the dispute. The con-

⁶In the present case the Plumbers Union complied with the 10(k) determination: the 10(l) injunction was, therefore, vacated and no complaint in fact issued against it.

tention of the Plumbers Union is that Zaich was bound, in 1962, by the procedures of the NJB; and that accordingly, picketing to compel compliance with the NJB's award was primary conduct the object of which was to compel compliance with an arbitration award. This object is a legitimate one, and does not violate the Act. See *Syracuse Supply Co.*, 139 N.L.R.B. 778, 780-81 (1962); *Pacific Maritime Ass'n*, 137 N.L.R.B. 119, 126 (1962).

2. The National Joint Board Resolved the Jurisdictional Dispute in Question in Favor of the Plumbers Union.

In the Spring of 1962 Appellant attempted and failed to secure a contract with Mr. Zaich. Because members of the Laborers Union were doing work which the Plumbers Union claimed to be within its jurisdiction, the Plumbers submitted the dispute to the NJB which in turn notified all parties that it would hold a hearing on the matter. The UECA notified the NJB on behalf of Zaich Construction Co. that the latter was not bound by the determination of the NJB. Significantly, however, no such notification was given to the Plumbers Union. And, of course, the Laborers Union gave no such notification because in fact it was a party to the NJB. The NJB proceeded to determine the case, awarded the work to the Plumbers Union and notified the parties of its decision. As there was no compliance with the decision of the NJB, the Plumbers Union picketed the non-complying company for the limited purpose of inducing compliance with the NJB's decision [11/20-14/3].

Picketing by the Plumbers Union was conducted on the assumption stated in its picket signs: that Zaich

was not abiding by a binding decision of the NJB. Since one of the conditions precedent to a decision by the NJB is that the employer be a member of a signatory employer association, it is obvious that both the Plumbers Union and the NJB considered that Zaich was such a member when the dispute was submitted to the NJB and the latter decided it.

3. Zaich Construction Co., as a Single Employer With Matt J. Zaich Co., Should Be Held to the Contractual Commitment of Matt J. Zaich Co. to Be Bound by the Determination of the National Joint Board That the Plumbers Union Had Jurisdiction of the Disputed Work.

a. Matt J. Zaich Co. Is Bound to the National Joint Board.

Matt J. Zaich Co. was a member of the Associated General Contractors at the time of the jurisdictional dispute in question [192/5-11]. The company had AGC labor agreements with the two principal unions with which Matt J. Zaich dealt, the Operating Engineers and the Laborers. These agreements bound Matt J. Zaich Co., as well as the unions signatory to those agreements, to the determinations of the NJB [262/8-18; 264/6-13; Defendant's Exs. G and N].

In May 1962, just before the commencement of the Calleguas Water Project, Zaich Construction Co. entered into a UECA contract with the Laborers [Plaintiff's Ex. 8]. Thus, Mr. Zaich had two contracts with the Laborers—one through Zaich Co. as a member of the AGC and one through Zaich Construction Co. as a member of the UECA.

In this way, Zaich could change the contractual coverage of Laborers employed by him by the manner in

which he bid the job, *i.e.*, depending on which corporate entity bid for a particular job [268/18-25].

There were only two differences between the AGC and UECA agreements. The one difference material to this case was that the UECA agreement did not contain the provisions for settlement of jurisdictional disputes by the NJB which the AGC agreement did have [267/23-268/8].

b. For Purposes of Federal Labor Policy, Matt J. Zaich Co. and Appellee Zaich Construction Co. Constitute a Single Employer.

Because of the federal labor policy, Zaich Construction Co. should be held to the commitment of Matt J. Zaich (made in Zaich Co.'s contracts) to submit jurisdictional disputes to the NJB. The national labor policy requires not only that employers and unions be held to contractual and legal obligations into which they voluntarily entered, regardless of the means they select to avoid these obligations, but this policy also obligates parties to abide by arrangements not necessarily of their own choosing where so obligating them fulfills a higher national objective. See, *e.g.*, *Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964) (requiring non-contracting employer to arbitrate whether or not it was bound by collective bargaining agreement of company that had merged with it).

In this case, the higher objective is the peaceful settlement of jurisdictional disputes. This policy is set forth in section 10(k); in the preamble to the Act (which states in section 1(b) [29 U.S.C. §151(b)] that its objective is to promote and encourage "the practice and procedure of collective bargaining"); and in other parts of the Act as well:

“[I]t is the policy of the United States that . . . sound and stable industrial peace . . . can most satisfactorily be secured by the settlement of issues between employers and employees through the process of conference and collective bargaining.” [29 U.S.C. § 171(a)].

“Congress was . . . interested,” said the Supreme Court, speaking of the enactment of the Taft-Hartley Act, “in promoting collective bargaining,” *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 453 (1957), and the Legislature recognized that “industrial peace can be best obtained” by judicial recognition and enforcement of agreements between unions and employers. *Id.*, 353 U.S. at 455.

The determination of questions under the Act “requires a consideration of the legislative object sought to be attained.” *LeBaron v. Los Angeles Bldg. Trades Council*, 84 F. Supp. 629, 632 (S.D. Cal. 1949). This legislative object is clearly to promote voluntary adjustments of disputes. And what better way to vitiate this policy than to hold that once voluntary adjustments are entered into, they may be circumvented through the use of different corporate entities to carry on a single business enterprise.

In the light, then, of this national policy, the conclusion is compelled that Zaich may not escape its commitment to the NJB. For purposes of binding Zaich to the NJB’s determination the following factors dictate that Zaich’s corporate entities be treated as one:

- i. Interrelation of operations.
- ii. Common management and ownership.
- iii. Centralized control of labor relations.

See 21 NLRB Ann. Rep. 14-15 (1956) and cases discussed below.

Matt Zaich's contracting business is carried on through two corporations and as an individual. He has contractor's licenses in his individual name and in two corporate names—Zaich Co. and Zaich Construction Co., the appellee herein [204/17-24].

Zaich's testimony shows that he would bid on a given job under any one of his three licenses, depending only on advice from his business manager [212/9-19]. And he stated that he used two corporations for tax purposes [222/19-21]. From this testimony it can be seen that Zaich's contracting business was in fact a single unitary enterprise. The use of two corporations is for the not uncommon purpose of minimizing his tax liabilities by manipulating the contracts undertaken by each corporation so as to divide his profits between several entities. The fact that the corporations are nominally separate for tax purposes has no bearing on whether the business enterprise engaged in by Zaich is such that it should be considered a single business in relation to federal labor policy. See *NLRB v. City Yellow Cab Co.*, 344 F.2d 575, 578 (6th Cir. 1965) (two separately taxed and competing corporations considered as one employer for jurisdictional purposes of NLRB).

The NLRB and the courts have had occasion to deal with the question of two or more corporations as a single employer, and in so doing have fashioned a federal labor policy which should govern in this case.

In *Schnell Tool & Die Corp.*, 144 N.L.R.B. 385 (1963), *enf'd*, 359 F.2d 39 (6th Cir. 1966), the Board held two corporations to be a single enterprise and a

single employer for purposes of giving remedial relief for unfair labor practices. The facts in *Schnell* were:

1. Both corporations were controlled by the same family with the same officers, directors and owners (In this case, Matt J. Zaich is the sole owner, and is an officer and director of both corporations).

2. The two corporations were engaged in similar but different work (The two corporations in this case are engaged in the same work).

3. There was a partial identity of location of plant premises (In this case, both corporations operate from the same premises).

4. The employees of the two concerns were interchanged as were tools and equipment (In this case, both employees and equipment were interchanged, though a bookkeeping charge was made by one corporation to the other for major equipment but not for hand tools).

5. The two companies were served by the same office and telephones (The same is true here).

6. One man ran both corporations, and directed the labor policy of each (The labor policies of both corporations in this case were directed by Matt J. Zaich).

The Board held that though the two entities in *Schnell* were separate corporations legally, they were a single employer for purposes of the Act since they were subject to the same ownership and control, engaged in related operations, and pursued the same labor policies. 144 N.L.R.B. at 388.

In *Pizza Products Corporation v. NLRB*, 369 F.2d 431 (6th Cir. 1966), *enfg*, 153 N.L.R.B. 1265 (1965), the court affirmed a finding by the Board that two corporate entities were a single employer. In that case

the two corporations were run by one man and they shared the same premises, one renting space from the other. The employees of one were loaned to another, but each had separate books and payrolls which were maintained by a common bookkeeper. All of these factors are present in the case at bar.

In *A. M. Andrews Co.*, 112 N.L.R.B. 626 (1955), *enf'd*, 236 F.2d 44 (9th Cir. 1956), the Board found that Illinois and Oregon corporations constituted a single employer for the purposes of finding one responsible for the acts of the other. In this case, the 95% shareholder of the Oregon corporation formed an Illinois corporation for the purpose of carrying on his business in Illinois. When threatened with unionization, the Illinois business was dissolved. The key factors to support a finding of single employership were:

1. The corporations were engaged in the same business (True of this case).
2. Owners and officers are nearly the same (The same is true here).
3. The Oregon corporation lent its credit to the Illinois corporation (In this case, bids and loans were made on the basis of the joint credit of the two corporations and the personal credit of Matt J. Zaich and his wife).
4. There was a transfer of the assets of the Illinois corporation to Oregon after the Illinois operation was closed (In this case, there was no closing out of one of the corporations, so that this condition is not present).
5. The labor relations of both corporations were controlled by one man (Matt J. Zaich controls both corporations here). 112 N.L.R.B. at 629.

Therefore, the Board held that the Illinois and Oregon corporations were a single employer and that the Oregon corporation was responsible for remedying the unfair labor practices committed in Illinois.

Zaich's operations in this case fall well within the scope of being a single employer for purposes of federal labor policy. Each of the factors involved in the above cases is present in Zaich's case.

To recapitulate these facts:

- i. Zaich Co. and Zaich Construction Co. were owned and completely dominated by one man—Matt J. Zaich.
- ii. The two corporations shared the same premises.
- iii. Zaich Construction Co. owned no assets other than its accounts receivable—it was a shell corporation used for the purpose of receiving funds from particular jobs in order to reduce tax liability.
- iv. The same employee handled the books of each corporation.
- v. Zaich Co. owns all equipment and hand tools used by Zaich Construction Co.; no accounting for the use of the hand tools is made, and for the heavy equipment rentals are based on year-end accounting entries which can be manipulated to achieve desired tax consequences.
- vi. Financing of Zaich Construction's projects is based on the credit of Zaich Company and Mr. and Mrs. Zaich. Mr. and Mrs. Zaich personally guarantee loans secured by Zaich Construction Co.
- vii. Zaich's operations were integrated—even to the extent that he could bid on a given job through either corporation—subject only to the advice of his business manager (tax adviser).

viii. Most importantly, Zaich ran both corporations' operations, including their labor relations. He could direct employees and equipment from one job and corporation to another. If two jobs were going simultaneously, he would manage both—and to the workers who might even work on both jobs, it would matter not at all in their relations on the job with Zaich that the job was bid in the name of one corporation or the other.

This is especially important in terms of the policies which supported a finding of single employership in *Schnell, Andrews and Pizza*. To the union and to the workers, corporate intricacies designed as sophisticated tax gimmicks mean little. They see one man, Matt Zaich, running the whole show. Mr. Zaich does not wear a "Zaich Co." hat one day and a "Zaich Construction Co." hat the next, at least not one that is visible to the men on his jobs.

In this case there is (1) interrelation of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership. These factors go to show operational integration which the Board uses as a guide to a finding of single employership. See 21 NLRB Ann. Rep. 14-15 (1956).

While on paper the corporate separateness of Zaich's operations may be clear, it is submitted that economic realities which have influenced the fashioning of a federal labor policy require a finding that Zaich Co. and Zaich Construction Co. are a single employer for the purpose of determining whether Zaich Construction Co. is bound by the jurisdictional determination of the NJB.

Not only is it fair to hold Matt J. Zaich to his contractual obligation to abide by the NJB's determination which he made through one of his corporate instrumentalities, but, more importantly, it would be manifestly unjust to hold that the Plumbers Union, on pain of paying a large money judgment, should have known that Mr. Zaich had a complex corporate setup for the management of his contracting business. Mr. Zaich should not be able so easily to escape his contractual responsibilities by reliance on technicalities and paper differences between his corporate entities.

There was no dispute in the evidence as to the way Zaich handled his business. The testimony was uncontradicted and it all came from Mr. Zaich himself. There are, therefore, no questions of credibility to be resolved. Whether appellee should be held to be bound to the NJB is a question of law—based upon the national labor policy—which this Court should determine independently of the trial court. See, *e.g.*, *Kwikset Locks, Inc. v. Hillgren*, 210 F.2d 483, 488-89 (9th Cir. 1953), *cert. den.* 347 U.S. 989 (1954); *Stevenot v. Norberg*, 210 F.2d 615, 619 (9th Cir. 1954).

While Finding of Fact No. 19 [R. A. 6] states that Zaich Company was not the *alter ego* of Zaich Construction Co., this is more properly a conclusion of law as the underlying facts on which such conclusion was based were uncontradicted. The same is true of Finding of Fact No. 15, which states that appellee was not a party to any agreement providing for arbitration of jurisdictional disputes by the NJB.

c. **As Zaich Construction Co. Was Bound by the NJB Determination, the Picketing by the Plumbers Union, Was Not an Unfair Labor Practice.**

The NLRB favors the voluntary adjustment of jurisdictional disputes, even to the extent that where such procedures are available and are binding on all the parties, the NLRB will decline to hear the case. See, e.g., *Ebasco Services Inc.*, 153 N.L.R.B. 873 (1965). Indeed, in *Ebasco*, though the losing union picketed after an NJB award in favor of another union, the NLRB dismissed the complaint against the picketing union and left the parties to the courts or other means to attempt to resolve the question of how to give effect to the award. This was because the picketing was at best a breach of contract but not a violation of the Act.

Where the primary purpose of picketing is to enforce a lawful obligation of the employer, the conduct does not violate the Act. *Syracuse Supply Co.*, 139 N.L.R.B. 778, 780-81 (1962); see *Sheet Metal Workers Union v. Aetna Corp.*, 359 F.2d 1, 5 (1st Cir. 1966) (“if such [great] force is to be given to collective bargaining agreements between management and unions, no less support should be given agreements to which unions resort to resolve their jurisdictional disputes”).

Otherwise stated, once a union has attained its objectives in a valid and binding agreement or award, it has a right to use economic action to require that its provisions be complied with. An obligation that an employer has incurred to assign work to members of one union rather than to members of another, may be enforceable, upon default by the employer, through eco-

nomic action by the injured union. *Pacific Maritime Ass'n*, 137 N.L.R.B. 119, 126 (1962). The NJB award in the instant case is such a binding award which the Plumbers Union had a right to enforce by picketing.

C. THE COURT ERRED IN AWARDING AS AN ITEM OF DAMAGES LEGAL FEES CLAIMED TO HAVE BEEN EXPENDED TO SECURE THE FILING OF THE UNFAIR LABOR PRACTICE CHARGE, TO SECURE AN INJUNCTION TO REMOVE THE PICKET LINE, AND FOR PARTICIPATION IN THE 10(k) HEARING.

1. Legal Fees for Filing an Unfair Labor Practice Charge Are Not Recoverable as Damages.

By taking judicial notice of the file in *Kennedy v. Plumbers*, United States District Court, Southern District of California, Central Division, Case No. 62-1623-CC, the Court will see that the unfair labor practice charges which are attached to the Petition for Injunction were filed not by an attorney but by Robert F. Wilken, who is associated with public relations for the UECA [334/19-24].

It is evident, therefore, that it was the Appellee's association which filed the charge on its behalf; consequently, whether or not attorney's fees were charged for this, they are not recoverable for not only is there a lack of proof of any services performed, but there is affirmative evidence of these services having been performed by others.

2. Legal Fees for Enjoining the Picketing Are Not Recoverable as Damages.

Likewise, there is no evidence of any work performed by attorneys hired by the Appellee in securing an injunction to enjoin the picketing. The only attorneys

whose names appear on the pleadings and points and authorities are those of the attorneys for the NLRB.

The Petition for Injunction was filed by the government lawyers on behalf of Ralph E. Kennedy, Regional Director of the Twenty-First Region of the Board. Nowhere in the file is there any evidence of the initiation, continuation, or necessary participation in proceedings by any attorney for the Appellee.

The Appellee's attorneys did not "secure" an injunction. The government did!

3. Legal Fees for Participation in a 10(k) Hearing Are Not Recoverable as Damages.

There were three bases upon which the Appellee purports to support its claim against the Plumbers Union for legal fees incurred. The first two have been discussed, and the third revolves around the attorneys' handling of the 10(k) proceeding.

The Appellee could not present below—and it cannot present here—any authority for the proposition that fees involved in the handling of a section 10(k) hearing are recoverable. Recovery of any fees for such participation should have been disallowed.

4. Proof of Each Item of Legal Fees Was Vague and Uncertain and, Therefore, Any Recovery of Legal Fees Should Be Disallowed.

The Appellee simply offered evidence of the amount that it expended in attorneys' fees [Plaintiff's Ex. 1, Schedules 2, 8]. No attempt was made to relate the fees to the services performed. Some of the fees, for example, may have been charged for advice rendered subsequent to the 10(k) hearing. Those fees, along with

the fees for participation in that hearing are clearly not recoverable. Since the Appellee did not establish with certainty for what services the fees were paid, they lack certainty and should be denied.

It is often stated that where it is certain that there was injury, it is not necessary that the extent of injury be certain. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1932). Notwithstanding the liberality of this rule on proof of damages, where damages are capable of definite and certain calculation, they "must be proved by facts from which their existence is logically and legally inferrable, and cannot be supplied by conjecture." *Christiansen v. Mechanical Contractors Bid Depository*, 230 F. Supp. 186, 194 (D.C. Utah, 1964).

If any legal fees are recoverable, it was certainly within Appellee's power to prove these with great certainty. There was no breakdown of the total amount claimed for legal fees as to the particular items of service allegedly rendered by counsel for Appellee. Since one or more of the attorney's services was an improper basis for recovery of damages, there is no basis upon which the Court can deduct an amount allocable to such service or services. For example, while there should be no recovery for legal fees incurred in the filing of the unfair labor practice charges, the Court could not determine how much of the \$4,317.21 was improper. It should be noted, in this connection that in the Findings of Fact and Conclusions of Law, there is no breakdown showing the cost of each legal service allegedly rendered [Conclusion of Law 7, R. A. 69].

VII.
CONCLUSION.

Based on the foregoing, the Record on Appeal and matters of which this Court may take judicial notice, the judgment of the District Court should be reversed.

Respectfully submitted,

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By CHARLES K. HACKLER,
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*Attorneys for Appellant Plumbers and
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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

PAUL CROST

NO. 22567 ✓

IN THE UNITED STATES COURT OF APPEALS
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Appellant,

vs.

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FILED

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APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES COURT OF APPEALS
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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in both counts of a two-count indictment, at the conclusion of trial without a jury.

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 545 and 3231. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in both counts of a two-count indictment returned by the Federal Grand Jury for the Southern District of California [C.T. 2-3]^{1/}.

Count One charged that appellant and Judi Taylor, with intent to defraud the United States, knowingly and wilfully smuggled, and clandestinely introduced into the United States from Mexico, approximately 10,000 amphetamine tablets, 5,000 Seconal capsules, and 24 packages of Keith Formula, which merchandise should have been invoiced, and fraudulently and knowingly imported and brought said merchandise into the United States contrary to law, in that said merchandise had not been presented for inspection, entered, and declared as provided by United States Code, Title 19, Sections 1459, 1461, 1484, and 1485 [C.T. 2].

Count Two charged that appellant and Judi Taylor fraudulently and knowingly concealed, and facilitated the transportation and concealment of, approximately 10,000 amphetamine tablets, 5,000 Seconal capsules, and 24 packages of Keith Formula, which merchandise, as the defendants then and there well knew, had been imported and brought into the United States contrary to law, in that said merchandise had not been presented for inspection, entered and declared as provided by United States Code, Title 19, Sections 1459, 1461, 1484 and 1485 [C.T. 3].

^{1/}

"C.T." refers to the Clerk's Transcript of Record.

Appellant waived the right to trial by jury on September 28, 1967 [C.T. 10]. Court trial of appellant commenced on September 28, 1967, before United States District Judge James M. Carter [R.T. 43]^{2/}. Appellant was found guilty as charged on that date [R.T. 98].

Thereafter, on November 6, 1967, appellant was committed to the custody of the Attorney General for treatment and supervision as a Youth Offender until discharged under 18 U.S.C.A. 5017(c) [C.T. 14]. Appellant filed a timely notice of appeal [C.T. 15].

III

ERROR SPECIFIED

Appellant specifies only one point upon appeal, contending that the trial Court committed error in the rejection of evidence of an extra-judicial statement allegedly made by a co-defendant who was not on trial.

IV

STATEMENT OF THE FACTS

Appellant and Judi Taylor entered the United States from Mexico in an automobile at San Ysidro, California, on April 15, 1967 [R.T. 44-45, 49-50]. Appellant, who appeared to be nervous, was the driver of the vehicle, which contained approximately 10,000 amphetamine tablets, 5,000 Seconal tablets, and 24 packages of Keith Formula. All of these items were in the spare tire of the vehicle [R.T. 44, 50, 54-59, 61-62].

^{2/}

"R.T." refers to the Reporter's Transcript on Appeal.

Appellant testified that he had left Covina, California, with Judi Taylor in the automobile, which was his; that they arrived in Tijuana and he parked and locked the vehicle; that he kept the keys but had another set of keys under the hood; and that Miss Taylor knew that there were other keys under the hood [R.T. 73-77].

He also testified that he and Miss Taylor separated in Tijuana; that they agreed to meet in about two hours, when she finished shopping; that he went to several bars and got drunk; that he met Miss Taylor in a bar; and that they had been separated for approximately two hours [R.T. 77-80].

He testified that he proceeded to the expected location of the vehicle; that it was gone; that he found it at a place like a towing company and paid a parking fine; that he and Miss Taylor drove toward the border; and that he did not know how the contraband got into the spare tire [R.T. 80-83, 86].

Appellant had given a similar statement to Customs officers, except that he refused to state whether he separated from Miss Taylor in Tijuana [R.T. 65-67].

Miss Taylor was called as a witness by the Government, refused to answer certain questions, and was found to be in contempt of court [R.T. 47].

Appellant offered evidence of a statement allegedly made by Miss Taylor after the arrest. The hearsay objection to this proposed testimony by appellant was sustained [R.T. 84-85].

ARGUMENT

A. THE OBJECTION TO THE ATTEMPTED HEARSAY TESTIMONY
WAS PROPERLY SUSTAINED.

Appellant contends that an extra-judicial confession by a third party is admissible in evidence in criminal cases. The law is to the contrary.

Donnelly v. United States, 228 U.S. 243, 272-277 (1913);

Jeffries v. United States, 215 F.2d 225, 226 (9th Cir. 1954);

Neal v. United States, 22 F.2d 52, 55 (4th Cir. 1927);

United States v. Mulholland, 50 Fed. 413, 416-19 (D.C., Kentucky 1892);

20 American Jurisprudence, p. 468.

"In this country there is a great and practically unanimous weight of authority in the state courts against admitting evidence of confessions of third parties, made out of court, and tending to exonerate the accused [citing numerous decisions]

"We do not consider it necessary to further review the authorities, for we deem it settled by repeated decisions of this court, commencing at an early period, that declarations of this character are to be excluded as hearsay."

Donnelly, supra, at pp. 273-76 (emphasis added).

Appellant suggests that the law should be changed. The United States Supreme Court has rejected this suggestion:

"The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well-established rule, the value of which is felt and acknowledged by all."

Donnelly, supra, at pp. 277-78.

The opinion in United States v. Dovico, 261 Fed. Supp. 862 (S.D.N.Y. 1966), cited by appellant, states that "it can hardly be said that federal authority supports the admissibility of hearsay declarations against penal interest." (at p. 870).

It is ironical that appellant seeks to utilize a rule based upon the theory that declarations against pecuniary interest are likely to be reliable and trustworthy, as the only "witness" to the alleged statement was appellant himself. There is not the slightest presumption that a defendant's self-serving narration of another person's alleged confession will be more trustworthy and reliable than ordinary hearsay testimony.

Assuming, for purpose of argument only, that the ruling of the trial Court was not supported by the overwhelming weight of authority, it is respectfully submitted that the ruling was not prejudicial to appellant. The trial Judge concluded that appellant was committing perjury [R.T. 95]. Appellant could hardly expect to pull himself up by his own bootstraps by saying, in effect, "I'm telling the truth, and to prove that I'm telling the truth, I'll tell you that this girl confessed to me."

In view of the notorious propensity of marihuana and drug conspirators

to attempt to exonerate each other, with one person "taking the rap" for all, the rule suggested by appellant would not assist the ascertainment of truth in the courtroom, particularly when the vital avenue of cross-examination is blocked.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

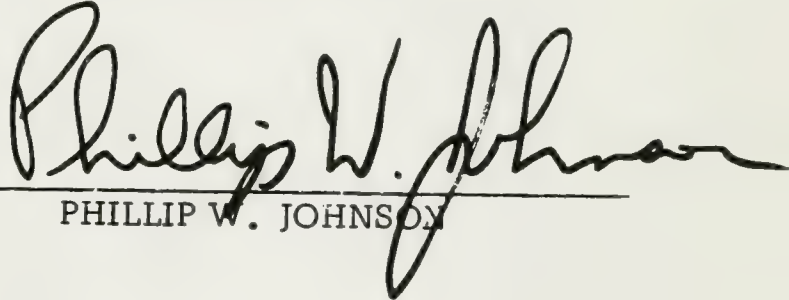
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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



PHILLIP W. JOHNSON

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FEB 24 1969

NO. 22558

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Rule 30, Federal Rules of Criminal Procedure.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL THOMAS DE CARLO,)
LAWRENCE DE CARLO,)
)
Appellants,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Appellee.)
_____)

NO. 22568

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the then Southern Division of the Southern District of California, adjudging appellants to be guilty as charged in all three counts of the indictment, following trial by jury. [C.T. 14]¹

The offenses occurred in the then Southern Division of the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 21, United States Code, Section 176(a).

¹ "C.T." refers to Clerk's Transcript.

Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellants and Miriam De Carlo were charged, together with Michael George Brown and Sharilyn George Brown, in all three counts of the indictment returned by the Federal Grand Jury for the Southern Division of the Southern District of California.

The first count alleged that on July 31, 1966, the Browns knowingly smuggled 19 pounds of marihuana into the United States from Mexico, contrary to Title 21, United States Code, Section 176(a), aided and abetted by appellants and Miriam De Carlo. [C.T. 2]

The second count alleged that on July 31, 1966, the Browns knowingly concealed and facilitated the transportation and concealment of approximately 19 pounds of marihuana, which, as they then and there well knew had been imported and brought into the United States contrary to law, aided and abetted by appellants and Miriam De Carlo. [C.T. 3]

The third count alleged that appellants and the Browns conspired to smuggle marihuana into the United States from Mexico and to conceal and facilitate the concealment and transportation in violation of Title 21, United States Code, Section 176(a), and to effect the object of the conspiracy

two overt acts were committed:

1. On July 31, 1966, all four went to Tijuana.
2. On July 31, 1966, Michael George Brown brought the marihuana into the United States from Mexico. [C.T. 4]

Jury trial of appellants commenced on March 28, 1967, before United States District Judge William P. Copple. Appellants were found guilty on all three counts as charged on March 29, 1967. [C.T. 33, 34]

A motion for a new trial was filed on June 26, 1967. [C.T. 40, 41] This motion was denied on June 30, 1967, after a hearing. [C.T. 49, 50]

Thereafter, on June 30, 1967, appellant Daniel Thomas De Carlo was committed to the custody of the Attorney General for five years upon each of counts one, two and three, to run concurrently with each other. On the same date, appellant Lawrence De Carlo was committed, pursuant to Title 18, United States Code, Section 5010(b), to the custody of the Attorney General for treatment and supervision until discharged pursuant to the provisions of the Federal Youth Corrections Act on each of the three counts to run concurrently with each other. [C.T. 54]

Notice of appeal was filed as to both appellants on June 30, 1967. [C.T. 50, 51]

III

ERRORS SPECIFIED

Appellants' errors specified on appeal are paraphrased as follows:

1. Admissions of appellants to "prior similar acts" were inadmissible.
2. Appellants' possession and smoking of marihuana on the trip to Mexico was inadmissible.
3. Appellants were compelled to testify in violation of the Fifth Amendment.
4. The court failed to properly instruct the jury as to the accomplice's testimony.
5. At the hearing on appellants' motion for a new trial, appellants were denied the right of confrontation of witnesses in violation of the Sixth Amendment.
6. The Court should have required corroboration of the Browns' testimony.

IV

STATEMENT OF THE FACTS

At 3:30 a.m. on July 31, 1966, Michael Brown drove his automobile into the United States at San Ysidro, California, from Tijuana, Mexico, with his wife, Sharilyn Brown as a passenger. [R.T. 41-43]² Eleven kilo-packages of marihuana were found under the hood of the vehicle. [R.T. 47-49]

Michael Brown testified that he picked up appellants and Miriam De Carlo at their home in Inglewood at about 11:30 a.m. on July 30, 1966. [R.T. 61] He then picked up his wife, Sharilyn, and all five went to Mexico. [R.T. 62] Danny looked for an American in Tijuana about obtaining some marihuana. He had dealt with the American before. [R.T. 65-66] While all five were present, he advised that the American did not have the amount of marihuana he wanted and he would try talking with a Mexican he had dealt with before. Because of success in prior dealings with the Mexican he felt he would not be caught. [R.T. 67-68]

Danny, Larry, and Mr. Brown negotiated with the Mexican. Around midnight they finally agreed with the Mexican to purchase the marihuana from the Mexican while all five were in the Mexican's taxicab. [R.T. 68-70]

² "R.T." refers to Reporter's Transcript.

Danny and Mr. Brown followed the taxi driver to his home. After two to three hours the marihuana was received by them and placed under the hood. [R.T. 71] Danny paid the Mexican \$400. [R.T. 72, 76] They then returned to the downtown area and left for the border where the DeCarlos alighted and walked through the border. [R.T. 74] This had been pre-arranged. [R.T. 74] They were to meet at Oscar's but the Browns were arrested. [R.T. 74, 75]

Larry De Carlo bought the gasoline for the trip and gave Mr. Brown spending money. He was to use any money he got from the venture to take a trip to Canada. [R.T. 76-77]

The De Carlos admitted to smuggling marihuana on previous occasions, the first time being about two months before. [R.T. 78, 86]

Mrs. Brown generally corroborated her husband's testimony and further testified they smoked marihuana provided by the De Carlos on the trip down. [R.T. 189]

The De Carlos testified the trip was a pleasure trip and that they became separated from the Browns in Tijuana and were thus returning by themselves on foot. [R.T. 108-134, R.T. 135-150, R.T. 159-164]

ARGUMENT

1. APPELLANTS' ADMISSIONS AS TO "PRIOR SIMILAR ACTS" WERE ADMISSIBLE.

Evidence of "prior similar acts" is admissible.

Theobald v. United States, 371 F.2d 769

(9th Cir. 1967);

Medrano v. United States, 285 F.2d 23, 26

(9th Cir. 1960);

Moose v. United States, 150 U.S. 57, 61 (1893).

Appellant admits he made no objection. [A.B. 33,

line 10]³ This constitutes a waiver unless there is plain error.

Ramirez v. United States, 294 F.2d 277,

283 (9th Cir. 1961);

Stein v. United States, 166 F.2d 851,

855 (9th Cir. 1948).

There is no error in this case.

The jury was instructed that appellants' statements made outside of court should be weighed with caution and great care [R.T. 238], and that they were not on trial for any act or conduct not alleged in the indictment. [R.T. 254]

The instructions were not objected to by counsel for appellants, and none were offered. This constitutes a

³ "A.B." refers to Appellants' Brief

waiver. Rule 30, Federal Rules of Criminal Procedure, and Rule 18(2)(d) of the United States Court of Appeals for the Ninth Circuit. Also see reasoning in Teasley v. United States, 292 F.2d 460, 467 (9th Cir. 1961). This evidence was further admissible for impeachment of appellants who claimed they had made no recent trips to Mexico [R.T. 110, 126, 142, 165], and further claimed no marihuana was in the car or smoked. [R.T. 110, 126, 142, 165]

See Anthony v. United States, 256 F.2d 56 (9th Cir. 1958), wherein the facts were very similar.

This evidence also tended to show an existing continuing conspiracy which the Browns joined. In Sanchez v. United States, 293 F.2d 260 (8th Cir. 1961) relied on by appellants, there were objections to the questions. Here there were none. In that case, the objectionable questions called for hearsay statements of a third party. The statements complained of here were statements of appellants as to prior identical acts, testified to in open court.

The error, if any, was cured by instructions of the court. [R.T. 254]

The jury in Sanchez was not given a "curing instruction" (supra, at 266).

2. APPELLANTS' POSSESSION AND SMOKING OF MARIHUANA ON THE TRIP TO MEXICO WERE ADMISSIBLE.

Mrs. Sharilyn Brown testified that marihuana cigarettes were passed to her and her husband from the back seat where the three De Carlos were seated.

Evidence of recent use of marihuana has been held admissible by this court.

Klepper v. United States, 331 F.2d 694
(9th Cir. 1964).

Evidence of a partially-smoked marihuana cigarette found in the defendants' apartment away from the scene of the crime and unconnected with the charge on trial, has been held admissible.

Teasley v. United States, supra at 466.

The smoking of the marihuana took place during the conspiracy.

. . . . "wide latitude" is allowed in presenting evidence and it is within the discretion of the trial court to allow evidence which even remotely tends to establish the conspiracy charged.

Schino v. United States, 209 F.2d 67,
74 (9th Cir. 1953).

Counsel were not surprised as claimed. The issue was raised in questions to Miriam De Carlo on cross-examination. [R.T. 167] No objection was then made nor when the question was asked of Mrs. Brown.

Enriques v. United States, 314 F.2d 703 (9th Cir. 1963) relied on by counsel as authority for points one and two is not in point. Different drugs were involved; use of marihuana in a heroin sale case.

The other cases cited on this point on Page 40 of appellants' brief lend little comfort to their position. To the contrary, they appear to support the government's theory.

In addition, smoking marihuana while riding in an automobile, certainly infers prior similar acts since it was no doubt being concealed and transported, thus an act identical to count two.

With admissions of prior recent smuggling, an inference can be drawn, they smuggled the marihuana they were smoking. However, possession would substitute for knowledge of illegal importation of the smoked marihuana.

3. APPELLANTS WERE NOT COMPELLED TO TESTIFY.

As argued in Point No. One, the testimony by Mr. Brown, as to similar acts, is admissible. Admissible evidence that might induce an otherwise hesitant defendant to testify can hardly be a violation of his rights not to testify. Besides, he can still refuse to testify.

Since Mr. Brown had clearly implicated appellants in the alleged smuggling, it is difficult to see how

admissions of prior appellants' smuggling ventures would cause appellants to testify.

Appellant again complains about instructions or lack of instructions, while admitting none were requested or objected to. [A.B. 49] Bruton v. United States, 88 S. Ct. 1620 (1968), relied on by appellants, is not in point. In Bruton extrajudicial admission of a co-defendant implicating Bruton were admitted. Here there was testimony of the Browns in open court as to statements and acts of appellants.

4. ACCOMPLICE INSTRUCTIONS WERE NOT REQUIRED.

The courts instructions were complete and "boiler plate" in nature.

Failure to give an accomplice instruction is not error. This is especially true when an instruction was not requested.

Rule 30, Federal Rules of Criminal Procedure.

Lopez v. United States, 373 U.S. 427 (1963);

O'Neal v. United States, 310 F.2d 175

(9th Cir. 1962);

United States v. George, 319 F.2d 77

(6th Cir. 1963).

The court instructed the jury to consider the circumstances under which the witness testifies. [R.T. 237]

It is probable that many criminal trial lawyers prefer no accomplice instruction when their clients testify

and deny guilt.

The court cautioned the jury that extra-judicial admissions "should be considered with caution and great care."

[R.T. 237]

The prior similar acts were limited. The Court instructed: "The defendants are not on trial for any act of misconduct not alleged in the indictment." [R.T. 254]

Again with no objection, and no proffered instructions results in a waiver.

Singer v. United States, 380 U.S. 24,

38 (1965);

Anthony v. United States, supra at 59,

and see O'Neal, supra.

Alleged error should be challenged during the proceedings and not for the first time on appeal.

5. APPELLANTS WERE NOT DENIED THE RIGHT OF CONFRONTATION.

Appellants contend the failure of the Browns to testify at the hearing on the motion for a new trial was a violation of the Sixth Amendment to the Constitution of the United States, their right to be confronted with the witnesses against them. The burden was on appellants. It was their motion. They made no attempt to produce the Browns. The government did, but was unsuccessful.

Appellants' motion for a new trial is apparently based on newly discovered evidence.

The evidence presented at the hearing was an attempt to impeach the government's witness, Mr. Brown. The witnesses testified, in effect, that Brown was testifying for the government to keep his wife from being deported to Canada.

There was no showing that the testimony of these witnesses was newly discovered. To the contrary, the witnesses were friends of the De Carlos' and were even fellow members of a motorcycle club. These witnesses were impeached at the hearing by a felony conviction and inability to identify Mr. Brown from a photograph.

The evidence, even if assumed to be newly discovered, would merely be cumulative, as the court found. Defense witness, Douglas Ulrich, testified to the same effect. [R.T. 152-153]

There was ample direct evidence in the form of the testimony of two eye-witnesses, Mr. and Mrs. Brown.

As to criminal cases, evidence upon appeal is viewed most favorable to the government.

Glasser v. United States, 315 U.S. 60 (1942);
Yeorgain v. United States, 314 F.2d 881,
882 (9th Cir. 1963).

This rule also includes all reasonable inferences to be drawn from the evidence.

Yeorgain, supra, at 882.

In the Federal courts, testimony of accomplices, without corroboration, is sufficient to convict.

Bible v. United States, 314 F.2d 106,
108 (Cert. Den. 375 U.S. 862);
Cheadle v. United States, 370 F.2d 314
(9th Cir. 1966).

This is true even though the accomplice is in a position to gain favors and even though there are inconsistencies in the testimony.

Lyda v. United States, 321 F.2d 788,
794 (9th Cir. 1963).

However, there is corroboration in this case, in the form of photographs of the defendants and their own admissions of being present in Tijuana.

In local jurisdictions that require corroborations, this corroboration need only be slight and need not be incriminating in nature.

It is interesting to note that neither Daniel nor Lawrence De Carlo, in their testimony, specifically denied knowing the marihuana was in the vehicle.

The evidence was, therefore, sufficient to be submitted to the jury and the motions for judgment of acquittal were properly denied.

VI

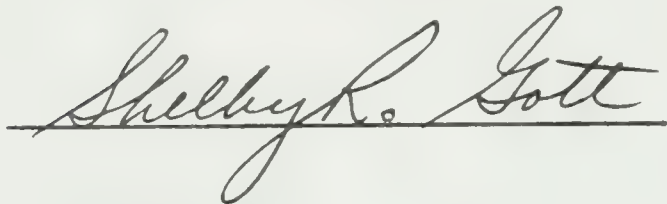
CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.
United States Attorney

SHELBY R. GOTT
Assistant U.S. Attorney

A handwritten signature in cursive script, reading "Shelby R. Gott", is written over a horizontal line.

SHELBY R. GOTT
Assistant United States Attorney

Attorneys for Appellee,
United States of America

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON, Warden,)
California State Prison,)
San Quentin, California,)
Appellant,)
vs.)
WILLIAM J. BOWIE,)
Appellee.)

No. 22569 ✓

APPELLANT'S OPENING BRIEF

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FILED

MAY 1963

WMA & LUCAS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|-----------------------------|---|-----------|
| LAWRENCE E. WILSON, Warden, |) | |
| California State Prison, |) | |
| San Quentin, California, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| vs. |) | No. 22569 |
| |) | |
| WILLIAM J. BOWIE, |) | |
| |) | |
| Appellee. |) | |
| _____ |) | |

APPELLANT'S OPENING BRIEF

JURISDICTION

The jurisdiction of the United States District Court to issue the writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

This is an appeal by Lawrence E. Wilson, former Warden and Louis S. Nelson, Warden of the California State Prison at San Quentin, California, respondent below and custodian of appellee, William J. Bowie, from an order of the United States District Court for the Northern District of California.

A. Proceedings in the State Courts.

Appellee, William J. Bowie, was convicted after trial in the Superior Court of the State of California for the City and County of San Francisco of assault with a deadly weapon. On February 10, 1961, he was sentenced to the state prison for the term prescribed by law.

Appellee appealed the judgment and the District Court of Appeal of the State of California affirmed the conviction on February 15, 1962. People v. Bowie, 200 Cal.App.2d 291. Appellee's petition for a hearing by the Supreme Court of the State of California was denied on April 11, 1962. On November 5, 1962, the United States Supreme Court denied Bowie's petition for a writ of certiorari. 371 U.S. 893.

An application for a writ of habeas corpus was denied by the California Supreme Court on February 20, 1963. On June 10, 1963, a petition for writ of certiorari was dismissed by the United States Supreme Court. 374 U.S. 818.

An application for a writ of habeas corpus was filed in the California Supreme Court on March 17, 1967 and was denied on June 21, 1967.

B. Proceedings in the Federal Courts.

In November of 1962, Bowie filed a "Petition for a Writ of Habeas Corpus Ad Testificandum" in the United States District Court for the Northern District of California, Southern Division, Case No. 41113.

On December 26, 1962, United States District Judge Stanley A. Weigel denied Bowie's petition for a writ of habeas

corpus.

On May 10, 1963, Bowie filed another "Writ of Habeas Corpus Ad Testificandum" in the United States District Court for the Northern District of California, Southern Division, Case No. 41584.

On July 6, 1963, United States District Judge W. T. Sweigert denied Bowie's petition.

Then, on September 25, 1963, Bowie filed an "Application for a Writ of Habeas Corpus with Allowance for Certificate of Probable Cause" in the United States Court of Appeals for the Ninth Circuit.

On January 16, 1964, Judge Stephens denied Bowie's petition for a writ of habeas corpus.

On January 14, 1965, the order of the United States District Court was affirmed by this Honorable Court (United States Court of Appeals No. 19396).

On May 17, 1965, three years after his conviction, appellee filed an application for a writ of habeas corpus in the United States District Court, Northern District of California, Southern Division. On that same date, an order to show cause was issued. Appellant, respondent below, filed a return to the order to show cause on June 11, 1965. Thereafter, additional points and authorities were filed by the respective parties and a hearing was held on July 7, 1965. Throughout the District Court proceedings appellee was represented by privately retained counsel.

On January 18, 1966, the District Court denied the

petition for writ of habeas corpus, discharged the order to show cause and dismissed the proceedings. The District Court concluded that appellee's claim that he made certain incriminating statements prior to being advised of his constitutional rights was foreclosed since the United States Supreme Court's ruling in Escobedo v. Illinois, 378 U.S. 478 (1964) could not be retrospectively applied. The court also determined that the appellee was advised of his right to counsel during the proceedings against him in the courts of the State of California and that appellee effectively waived the right to assistance of counsel. Finally, the court concluded that the absence of the complaining witness from the trial in Superior Court did not constitute a denial of due process.

On February 14, 1966, a notice of appeal was filed. On February 23, 1966, a certificate of probable cause was issued by the Honorable Alfonso J. Zirpoli, Judge of the United States District Court, Northern District of California, Southern Division.

On February 15, 1967, this Court vacated the order of the United States District Court denying the writ of habeas corpus in order to allow the appellee to exhaust his state remedies on three questions: "1. Whether he was deprived of his right of confrontation of witnesses as guaranteed by the Sixth Amendment. 2. Whether his incriminating statements were involuntary. 3. Whether he should have been warned as to his right not to testify as guaranteed by the United States Constitution."

On November 16, 1967, the District Court ordered that the writ of habeas corpus be issued. Execution of the order releasing appellee from custody was stayed pending filing of a notice of appeal. The appellant's petition for a certificate of probable cause to appeal was granted on December 5, 1967 at which time a notice of appeal was filed. On that same date the District Court granted appellant's motion for stay of execution of its order pending determination on appeal.

Appellee's application for release on his own recognizance was denied on March 8, 1968 by this Court.

The District Court in granting the writ held that the transcript of the preliminary hearing was improperly admitted into evidence in violation of the appellee's Sixth Amendment right to confront and cross-examine witnesses. The court further held that a trial judge must inform a defendant, representing himself in propria persona, of his right not to take the stand.

STATEMENT OF THE FACTS

A. Facts established at the trial in superior court.

Officer Dennis Finnegan of the San Francisco Police Department testified that he responded to a call at 481 Minna Street on December 3, 1960, at approximately 9:00 o'clock in the evening (RT* 32). On entering the lobby of the hotel located at that address, appellee was discovered slashing and stalking Peter Coletsos with a knife (RT 32, 33). Coletsos

* As hereinafter used, "RT" refers to the Reporter's Transcript of the proceedings held in the Superior Court for the City and County of San Francisco.

was bleeding from the left side just under his ribs (RT 33). There was blood on the knife and blood on appellee's hands (RT 33). The police officer ordered appellee to drop the knife and turn around. The officer repeated his order and the appellee then turned around with the knife still in his hand and pointed it at the police officers (RT 34, 40). The officers jumped the appellee, knocked him to the ground and took the knife from him.

The police officers asked appellee why he had stabbed Mr. Coletsos and he replied that he had stabbed him because he had interfered. Appellee also said he would kill him (Coletsos) if he had a chance and that he would have killed him if the police had not arrived (RT 36). Mr. Coletsos was taken in an ambulance to the emergency hospital to receive medical treatment (RT 36).

A second officer arrived on the scene at the point of time when appellee was being subdued and he observed wet blood on the appellee, on the floor and on the victim (RT 42). The appellee voluntarily admitted to this officer that he wished he had killed the man whom he had stabbed and that he would have liked to have gotten one of the policemen also (RT 43).

The People attempted to subpoena Mr. Coletsos but were unable to do so (RT 44).

The appellee testified in his own behalf and stated that he had drunk approximately three fifths of wine, that he had taken aspirin and other medication for a severe headache which made him unable to recall all the events that had transpired (RT 45, 46, 50). Appellee did recall that he had

fought with a man who attempted to enter his apartment but declared that it was in defense of himself, his wife and his home (RT 45, 46, 50). Appellee stated that the figure with whom he struggled had attacked him with a hammer and also struck him with such an instrument. Appellee admitted that the man with whom he had fought went downstairs and that he himself ran down the stairs for help and that everything else was a blank (RT 50).

B. The preliminary hearing proceedings.

Peter Coletsos testified at the preliminary examination that he was living at 481 Minna Street in the city and county of San Francisco, on December 3, 1960. As he was walking out in the hallway at approximately 9:00 p.m., he started to pick up some newspapers in the hall when he was approached by the appellee who abused him and tried to kick him (PHT* 8). Coletsos had never seen appellee before (PHT 8). Coletsos then walked downstairs. Appellee followed him downstairs with a knife and cut him in the neck and stomach with the knife. Coletsos was bleeding from these wounds when the officers arrived and subdued appellee. As a result of these wounds, Coletsos spent nine days in the hospital (PHT 8-9).

Irene Bowie, appellee's wife, testified at the preliminary examination to the effect that she had stabbed herself (PHT 19-20).

* As hereinafter used, "PHT" refers to the transcript of the preliminary hearing held in the San Francisco County Municipal Court.

APPELLANT'S CONTENTIONS

I. The District Court erred in holding that petitioner had been denied the right of confrontation and cross-examination of witnesses.

II. The District Court erred in holding that the state trial court was compelled to advise petitioner of his constitutional right not to take the stand.

ARGUMENT

I

THE DISTRICT COURT ERRED IN HOLDING THAT PETITIONER HAD BEEN DENIED THE RIGHT OF CONFRONTATION AND CROSS-EXAMINATION OF WITNESSES.

The District Court in its opinion stated that "the sole question for decision, then, is whether the prior recorded testimony was properly admitted." The court thereafter held that it was improperly admitted. The District Court thus completely omitted a second and crucial question, i.e., whether the state trial court read and considered the prior recorded testimony. It is appellant's position that the record clearly demonstrates that the trial court never read or considered the transcript of the preliminary hearing and that the evidence introduced in the Superior Court, disregarding the preliminary examination transcript, is sufficient to support petitioner's conviction.

In order to determine whether the trial judge read and considered the preliminary hearing transcript the state court record must be carefully examined.

An analysis of the Reporter's Transcript discloses that on January 11, 1961, appellee appeared for arraignment. At this time he pleaded not guilty to each of the charges against him and demanded a jury trial (ART* 1-2). February 9, 1961 was set as the trial date (ART 3). On January 13, 1961, at his request, appellee's case was advanced and called for trial. Appellee was asked if he wished to submit the matter on the transcript. At this point, the public defender who was not representing appellee interposed that appellee did not understand and suggested that the matter be set for January 20, 1961 (RT 1-2). Appellee requested the transcript of the preliminary examination which had apparently been delivered to someone attached to the Public Defender's office (RT 2-4). Appellee insisted on an early trial date.

On January 20, 1961, appellee's case was called for trial in the Superior Court for the City and County of San Francisco. At the time the clerk called the matter, he made the following statement:

"THE CLERK: The matter of William Bowie, for decision. He had waived a jury trial and submitted it on the transcript.

THE DEFENDANT: Yes.

THE CLERK: We haven't received that transcript.

THE COURT: He didn't receive it?

* As hereinafter used, "ART" refers to the Augmented Reporter's Transcript of the proceedings held in the Superior Court for the City and County of San Francisco.

THE CLERK: Fitzgerald Ames --

THE COURT: He never received it?

THE DEFENDANT: I don't know -- they were over there when I gave it to --

THE CLERK: He's got it.

THE COURT: Oh, he has it? You want a hearing now, is that right?

THE DEFENDANT: Yes.

(The transcript of the preliminary hearing was received, reading as follows:)" (RT 5:4-19).

* * *

THE COURT: All right. Call the witnesses. You sit right at the counsel table.

MR. FLOYD: In any case, the matter was submitted on the transcript.

THE COURT: Did you submit the case on the transcript? Did you intend that I read this transcript and make a decision from that, or did you want to testify?

THE DEFENDANT: Your Honor, I want the witnesses present, with the Court's approval, to question them, to have the privilege of cross-examining them, and let the Court decide the matter after that.

THE COURT: Very well.

MR. FLOYD: At this time, your Honor, may I call Officer Finnegan to the stand, please." (RT 31:1-14).

Thereafter, Officer Finnegan took the stand and testified that he saw Bowie with a knife in his hand slashing at one

Peter Coletsos. Coletsos had no weapon and was bleeding from a wound on his left side. Bowie admitted to the officer that he stabbed Coletsos and would have killed him had the police not arrived. Petitioner thereafter cross-examined Officer Finnegan. Officer Mulligan was then called by the prosecution, testified in corroboration of Officer Finnegan's testimony, and was then cross-examined by Bowie. The People rested after the prosecutor informed the court that they had subpoenaed Coletsos but that he was not in court. The petitioner then took the stand and testified in his behalf. The trial judge thereafter found the petitioner guilty of the lesser included offense of assault with a deadly weapon (Count One) and dismissed the other count of assault with intent to commit murder (Count Two).

The above detailed review of the state trial court record demonstrates that the trial court did not consider the transcript of the preliminary hearing in arriving at its finding that the appellee was guilty of assault with a deadly weapon. Thus, the record shows that after the appellee replied in the affirmative that he had waived a jury trial and submitted the case on the transcript, the clerk stated, "We have not received the transcript." In other words, the court did not at that time have a copy of the preliminary hearing transcript.

The court then asked if the appellee wanted a hearing now, and the appellee replied in the affirmative. At this point, the court reporter stated the preliminary hearing transcript was received. The trial judge then requested the prosecutor to

call the witnesses. When the prosecutor stated the matter was submitted on the transcript, the trial judge asked the appellee if he was submitting the case on the transcript. The appellee then stated that he wanted the witnesses present to question them and let the court decide the matter after that. The court then stated, "Very well," and the prosecutor then called the witnesses. The appellee thereafter testified and immediately thereafter the trial judge found the defendant guilty of assault with a deadly weapon. Inasmuch as the trial judge granted appellee's request that the witnesses testify in Superior Court and the fact that the trial judge found appellee guilty immediately after the testimony had concluded, with no recess or break in the proceedings for purposes of reading the transcript submitted, it is clear that he rested his decision solely upon the evidence produced before him at the trial in Superior Court. Here the trial court record affirmatively shows that the trial judge had not received the preliminary hearing transcript prior to the Superior Court proceeding, that he then immediately heard the testimony of the officers and the petitioner and thereafter immediately found the defendant guilty. The record amply demonstrates that the trial judge totally disregarded the transcript of the preliminary hearing in making his finding that appellee was guilty of assault with a deadly weapon.

The only remaining question therefore is whether the evidence produced before the Superior Court, standing alone, without reference to the proceedings of the preliminary examination is adequate to support the conviction. It is

appellant's contention that the evidence is more than sufficient to support petitioner's conviction for the offense of assault with a deadly weapon in violation of California Penal Code section 245.

In any event, there would be no basis for this Court to hold the evidence insufficient. There is a difference between a conviction based on evidence deemed insufficient as a matter of state criminal law and one so totally devoid of evidentiary support to raise a due process issue. It is only in the latter situation that there has been a violation of the Fourteenth Amendment affording the state prisoner a remedy in a federal court on a writ of habeas corpus. Thompson v. City of Louisville, 362 U.S. 199, 206 (1960); Buchanan v. McGee, 290 F.2d 711 (9th Cir.), cert.denied 368 U.S. 990 (1961).

Certainly in this case there was substantial evidence against the petitioner. A San Francisco police officer was called to the Minna Street address where appellee resided, at approximately 9:00 p.m. on December 3, 1960. He entered the lobby of the hotel and found appellee with a knife in his hand, slashing and stalking one Peter Coletsos (RT 32). Coletsos had no weapon (RT 33). There was blood on the knife and on Coletsos and Coletsos was bleeding from his left side just under his ribs. Coletsos had to be taken to the hospital for medical treatment. Appellee made a voluntary confession to two police officers to the effect that he stabbed Coletsos, and would have killed him had the police not arrived. He said that the victim had been knocking at his door and had bothered him and that he was going

to kill him (RT 36-41). The bone-handled knife used by appellee was received into evidence (People's Exhibit I, RT 33, 44).

In appellee's own testimony, he corroborated the evidence against him, at least to the extent of the happening of a fracas and, more specifically, that he had struggled with this individual and that both had gone downstairs (RT 50).

The foregoing evidence is amply sufficient to support appellee's conviction of the crime of assault with a deadly weapon. The gist of such an offense is an assault with a weapon likely to produce death or great bodily harm. People v. Lushenko, 170 Cal.App.2d 772 (1959). In a conviction for violation of section 245 of the Penal Code, it is the character of the weapon and the method of its use which form the essential elements of the offense. People v. Peak, 66 Cal.App.2d 894 (1944).

A knife, although not an inherently dangerous weapon, becomes an instrument of that character when it is used in a manner, such as stabbing, so as to cause severe bodily injury. People v. Arguilida, 85 Cal.App.2d 623 (1948). The trier of fact could, and in the instant case by its decision did, find the knife (People's Exhibit I) to be a deadly weapon. People v. Kersey, 154 Cal.App.2d 364 (1957).

It is not incumbent upon the prosecution to establish any specific intent in a case of this type but where the evidence is sufficient to establish the character of the instrument, the requisite intent is implied by the doing of the unlawful act. People v. McCoy, 25 Cal.2d 177 (1944); People v. Peak, 66 Cal.App.2d 894 (1944).

Nor is the prosecution required to call any specific witnesses as long as they carry their burden of proof beyond a reasonable doubt to show that the defendant perpetrated the crime in question. McCray v. Illinois, 386 U.S. 300, 313 (1967); Cooper v. California, 386 U.S. 58, 62 (1967); Ferrari v. United States, 244 F.2d 132 (9th Cir. 1957), Darneille v. United States, cert.denied 355 U.S. 873; People v. Price, 172 Cal.App.2d 776 (1959); People v. McCrasky, 149 Cal.App.2d 630 (1957).

The testimony of a single witness, in this case one of the arresting officers, was sufficient to carry the prosecution's burden of proof and to support appellee's conviction. People v. Kersey, 154 Cal.App.2d 364 (1957); People v. James, 133 Cal.App.2d 478 (1955). The testimony of the arresting officer, coupled with the uncontradicted admissions of the appellee, present an almost conclusive case of the sufficiency of the evidence.

II

THE DISTRICT COURT ERRED IN HOLDING THAT THE STATE TRIAL COURT WAS COMPELLED TO ADVISE PETITIONER OF HIS CONSTITUTIONAL RIGHT NOT TO TAKE THE STAND.

The District Court held that the federal Constitution requires that a defendant in a state criminal proceedings must be warned of his constitutional right not to take the stand and of the consequences that might follow should the defendant elect to do so. The cases relied upon by the District Court do not furnish any authority for this proposition. United

States v. Luxemburg, 374 F.2d 241 (6th Cir. 1967), merely held that the Fifth Amendment privilege against self-incrimination was applicable in proceedings before a federal Grand Jury and that failure to admonish the defendant was error. Cliett v. Hammonds, 305 F.2d 565 (5th Cir. 1962), held that the failure of the federal District Court to warn a defendant in a criminal contempt proceeding of a right against self-incrimination was error. Kirschner v. Boles, 212 F.Supp. 9 (N.D. W.Va. 1963), involved a failure to comply with a state recidivist statutory requirement which was jurisdictionally mandatory, thereby rendering the sentence void.

Moreover, under the facts of this case there is an even more fundamental reason why the District Court erred in reversing Bowie's conviction. The court specifically held that the federal Constitution required the state trial court to advise a defendant of his constitutional right not to take the stand. However, the Fifth Amendment was not made applicable to the states until 1964 when the United States Supreme Court held in Malloy v. Hogan, 378 U.S. 1 (1964), that the Fourteenth Amendment makes the Fifth Amendment privilege against self-incrimination applicable to the states. In Tehan v. Shott, 382 U.S. 406 (1966), it was further held that the infringement of the privilege against self-incrimination by permitting erroneous comment on the failure of the defendant to take the stand cannot be collaterally raised to attack judgments which became final prior to the date of Griffin v. California, 380 U.S. 609 (1965). The United States Supreme Court there stated:

"As in Mapp, therefore, we deal here with a doctrine which rests on considerations of quite a different order from those underlying other recent constitutional decisions which have been applied retroactively. The basic purpose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal trial or to deny a full opportunity to appeal a conviction because the accused is poor is to impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent. [Citations omitted.] The same can surely be said of the wrongful use of a coerced confession. [Citations omitted.] By contrast, the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values--values reflecting the concern of our society for the right of each individual to be let alone. To recognize this is no more than to accord those values undiluted respect." Tehan v. Shott, supra at 416.

So, too, the trial court's failure to advise an in propria persona defendant of his right not to take the stand is not an adjunct to the ascertainment of truth. Thus, until 1964 "the exemption from compulsory self-incrimination in the courts of the States [was] not secured by any part of the Federal Constitution." Tehan v. Shott, supra at 410, quoting Twining v. New Jersey, 211 U.S. 78 at 114 (1908).

In the instant case the petitioner's trial took place on January 20, 1961 and the judgment of conviction was affirmed by the California District Court of Appeal on February 15, 1962. Malloy v. Hogan was decided on June 15, 1964. It is therefore submitted that petitioner may not collaterally attack his state conviction on the grounds that the conviction was obtained in violation of his rights under the Fifth Amendment when the judgment was final prior to the decision in Malloy v. Hogan.

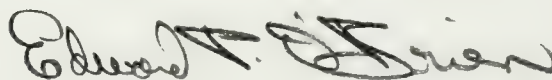
CONCLUSION

For the foregoing reasons, appellant respectfully requests that the order granting the writ of habeas corpus entered by the court below be reversed and the proceedings dismissed.

Dated: May 22, 1968

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

Dated: San Francisco, California

May 22, 1968.

A handwritten signature in dark ink, reading "Edward P. O'Brien". The signature is written in a cursive style with a large, stylized "E" and "O".

EDWARD P. O'BRIEN
Deputy Attorney General
of the State of California

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON, Warden,
California State Prison,
San Quentin, California,

Respondent and Appellant,

vs.

WILLIAM J. BOWIE,

Petitioner and Appellee.

No. 22569

APPELLANT'S REPLY BRIEF

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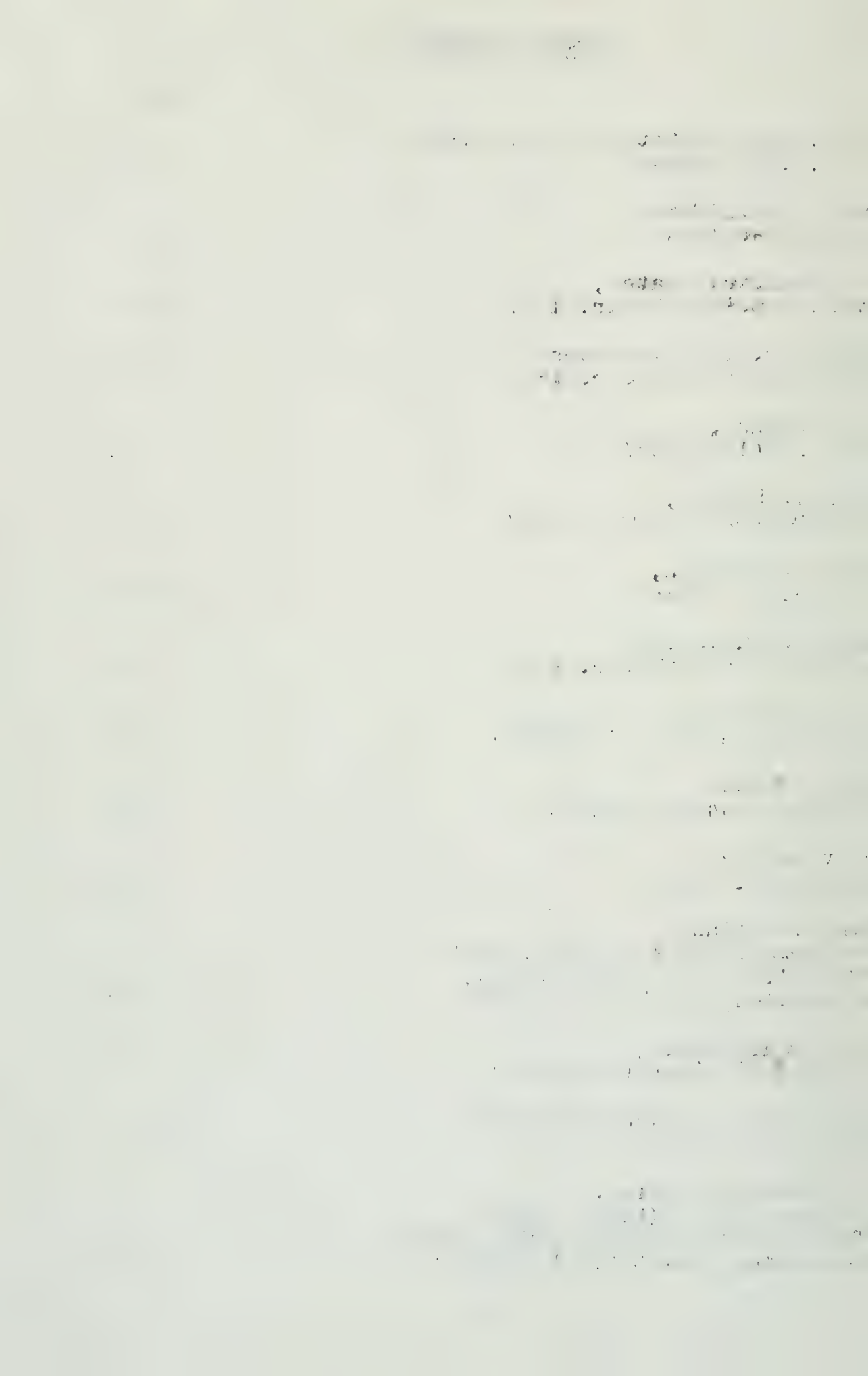


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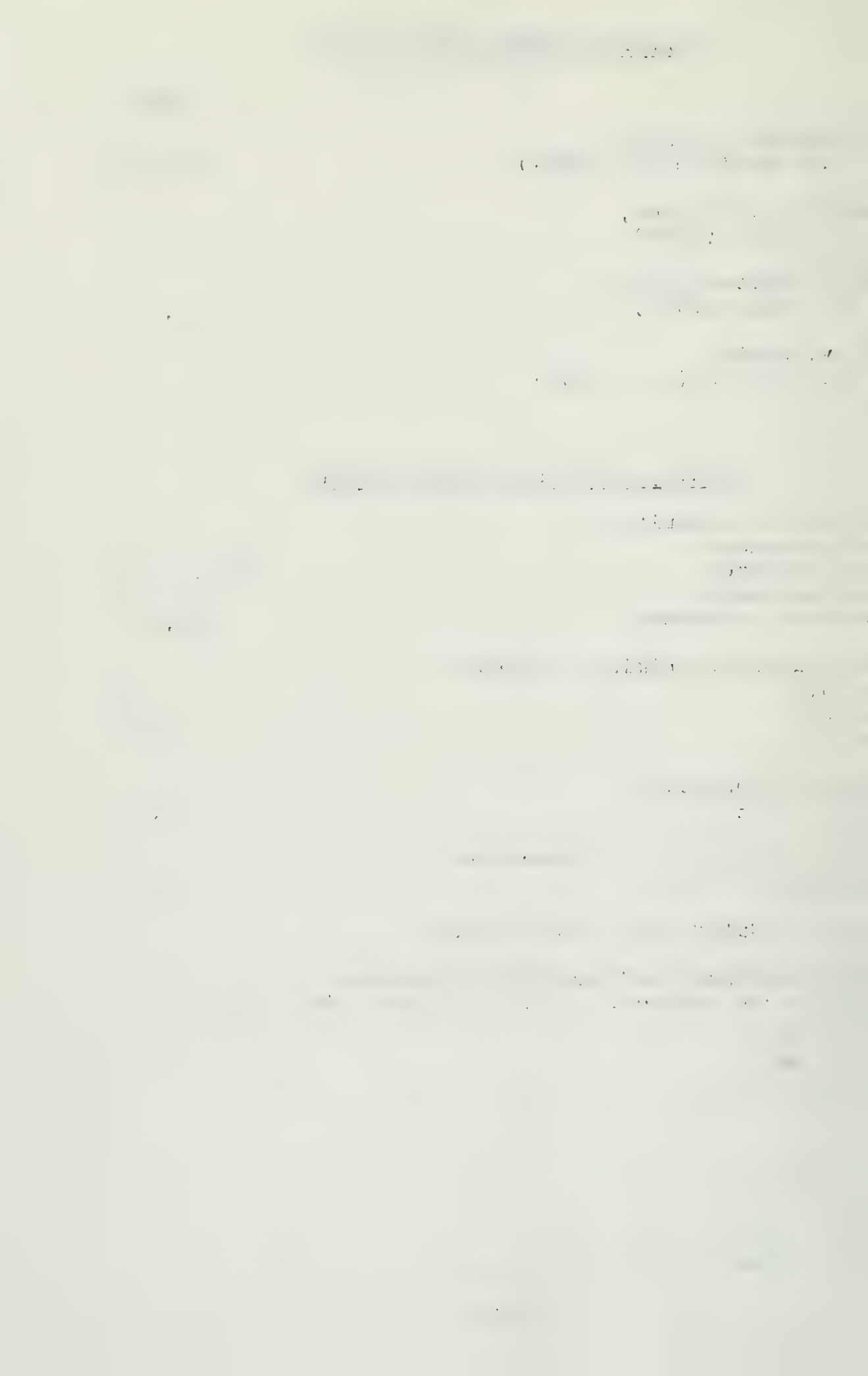
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APPELLANT'S REPLY BRIEF

I

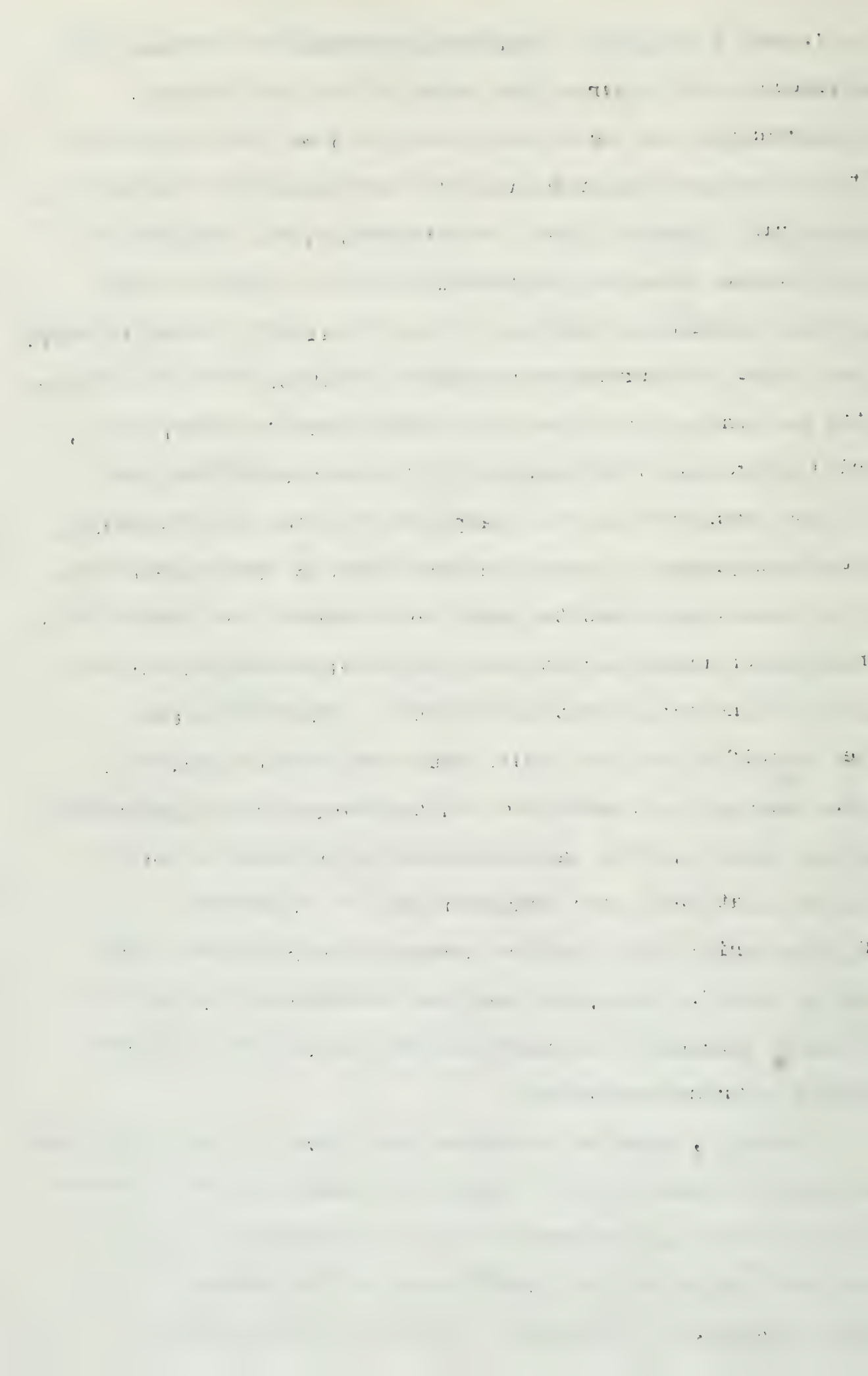
APPELLEE WAS NOT DENIED THE RIGHT OF CON-
FRONTATION AND CROSS-EXAMINATION OF WITNESSES.

Appellee initially contends that the instant case is controlled by Barber v. Page, 390 U.S. 719 (1968). (Appellee's Brief, p. 12). That case held that the preliminary hearing testimony of a witness is not admissible at the trial in the absence of a showing that the witness is unavailable. Barber v. Page is not applicable to the case at bar since the case was not submitted on the basis of the preliminary hearing transcript but rather was decided pursuant to a trial in the Superior Court.

Appellee contends that the preliminary hearing transcript was considered by the trial court. To support this contention appellee attempts to rely on the presumption that official duty is presumed to have been duly performed. Cal.

Code Civ. Proc. § 1963(15). He then contends that where a case is submitted to the court on the basis of the preliminary hearing transcript the court has a duty to read the transcript and it is therefore presumed that the court read and considered the transcript. However, such presumption is not applicable since the instant case was not submitted to the court on the basis of the preliminary hearing. The trial court record clearly shows that when the prosecutor asserted that the case was being submitted on the basis of the preliminary hearing transcript, the trial judge asked the appellee if he was submitting the case on the transcript and the appellee replied that he wanted the witnesses present to have the privilege of cross-examining them. The court accepted the appellee's request and thereafter the prosecution presented its case in chief consisting of the testimony of the two arresting officers. Thereafter the appellee testified and the judge found the appellee guilty. Thus, the case was not submitted on the basis of the preliminary hearing but rather, after appellee clearly refused to submit the case on that basis and demanded that the witnesses testify, the trial court had the prosecution go forward with its case in chief. Thus, the case was decided on the basis of the testimony presented in court and not on the basis of the preliminary hearing transcript.

Finally, appellee contends that "even if the transcript was not formally admitted the transcript contained the victim's testimony was used by the appellee to cross-examine Officer Finnegan and was before the trial court in that posture." (Appellee's Brief, p. 18:16-18). In other words, appellee



maintains that a defendant's use of a preliminary hearing transcript for purposes of impeaching prosecuting witnesses violates his right of confrontation and cross-examination of witnesses. To state the proposition is to refute it. The mere fact that a defendant uses portions of the preliminary hearing transcript for impeachment purposes clearly does not violate his right to confront the witnesses who testified at the preliminary hearing.

II

A STATE COURT HAS NO CONSTITUTIONAL DUTY TO ADVISE A SELF-REPRESENTED CRIMINAL DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO DECLINE TO TESTIFY OR OF THE POTENTIAL CONSEQUENCES OF AN ELECTION TO TESTIFY. IF ADOPTED, SUCH A RULE MUST BE MADE PURELY PROSPECTIVE.

The District Court held that the federal Constitution imposes upon state trial courts a duty to advise self-represented criminal defendants of their constitutional right to decline to testify and of the possible consequences of an election to testify. This holding is unprecedented. We submit that the District Court erred both in its holding on the substantive issue and in permitting its newly announced rule to serve as a basis for collateral attack.

The District Court based its holding upon two California cases, three federal cases, and upon its faulty analogy to Miranda v. Arizona, 384 U.S. 436 (1966).

People v. Glaser, 238 Cal.App.2d 819, 48 Cal.Rptr. 427, (1965), restated the holding of People v. Kramer, 227 Cal.App.2d 199, 38 Cal.Rptr. 487 (1964), that an unrepresented defendant must be advised that he need not take the stand.

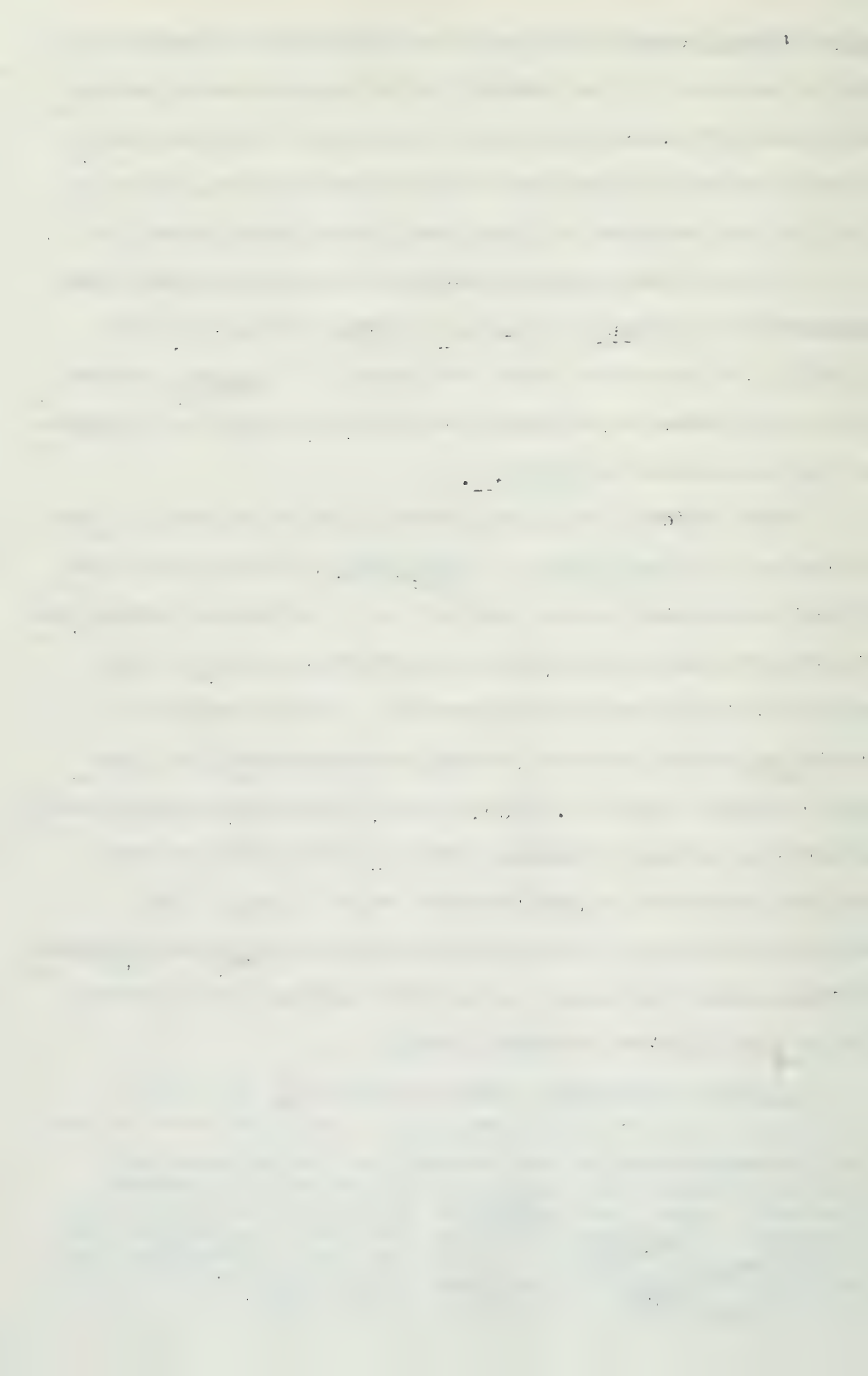
Glaser and Kramer rest exclusively upon California Constitution, article I, section 13; the admonition is required as a matter of state law. The District Court's statement that these cases rest upon alternative state and federal grounds (Op., 6) is an error of law not repeated by appellee. (Appellee's Brief, 20.)^{1/}

We note that another state has declined to adopt the rule announced in Kramer. Wright v. State, 285 S.W.2d 762 (Tex. 1955). We note also that California, in Glaser, refused to allow as grounds for collateral attack an alleged violation of the rule announced in Kramer.

Three federal decisions were cited in support of the opinion below. United States v. Luxenberg, 374 F.2d 241 (6th Cir. 1967), contained dictum stating that a defendant appearing before a federal grand jury must be admonished that he need not make self-incriminating statements. A defendant has no right to have counsel present during federal grand jury proceedings. Fed.R. Crim. P. 6(d). Thus, he is truly unrepresented. A defendant in a state criminal trial has the right to have retained or appointed counsel present at all times. One who waives that right is not unrepresented but self-represented. A self-represented defendant is not entitled to more judicial protection than an unrepresented person.

Cliett v. Hammonds, 305 F.2d 565 (5th Cir. 1962),

1. An examination of the authorities relied upon in Kramer will disclose that they, too, do not posit a federal constitutional rule. See Cochran v. State, 117 So.2d 544 (Fla. 1960); People v. Chlebowy, 191 Misc. 768, 78 N.Y.S.2d 596 (Sup. Ct. 1948); People v. Morett, 272 App.Div. 96, 69 N.Y.S.2d 540 (1947); State v. Lucas, 24 Conn.Supp. 353, 190 A.2d 511 (1963); Stevens v. State, 232 Md. 33, 192 A.2d 73 (1963).



also cited, merely held that failure to advise a defendant of the right to refuse to testify in a criminal contempt proceeding was an error of federal procedure.

Only Kershner v. Boles, 212 F.Supp. 9 (N.D. W.Va. 1963), cited below, involved a state defendant. At sentencing, Boles was asked by the trial court to identify himself as the subject of a prior conviction. He did so and was sentenced as a recidivist. Contrary to a mandatory provision of state law, Boles was not informed of the purpose of the inquiry nor was he in any way cautioned about the effect of an affirmative answer. Because the state court failed to proceed in accordance with state law, Boles was denied due process of law. See Spry v. Boles, 299 F.2d 332 (4th Cir. 1962), relied upon in Kershner.

Overlooked by the District Court are Wilson v. United States, 162 U.S. 613, 623-24 (1896), and Powers v. United States, 223 U.S. 303, 313-14 (1912), holding that an unrepresented accused appearing before a magistrate need not be apprised of his right to remain silent.^{2/} Both cases come close to holding that the warning is not constitutionally required for any witness. United States v. Cleary, 265 F.2d 459, 462 (2d Cir. 1959).

Finally, the District Court reasoned that since trial court proceedings, like police station interrogations, can be inherently coercive, defendants are entitled to be advised of their Fifth Amendment rights in both situations.

2. The precise holdings are changed by Fed.R. Crim. P. 5(b).

Cf. Miranda v. Arizona, supra. Few analogies which liken open court proceedings to secret interrogations, which equate unlawful coercion by the State with self-coercion, and which compare recorded proceedings with unrecorded events could survive analysis; this is not one. Miranda seeks to regulate the relationship between citizens and law enforcement, to remove conditions conducive to coercion which may result in unreliable self-incrimination, and to substitute prophylactic measures for the rather unworkable traditional test of voluntariness. None of these goals would be achieved by the admonition which appellee urges upon this Court.

Once a criminal defendant has elected to proceed in propria persona, and has effectively waived counsel,

"[H]e assumes for all purposes connected with his case, and must be prepared to be treated as having, the qualifications and responsibilities concomitant with the role he has undertaken; he is not entitled either to privileges and indulgences not accorded attorneys or to privileges and indulgences not accorded defendants who are represented by counsel." People v. Mattson, 51 Cal.2d 777, 794, 336 P.2d 937 (1959). Accord, People v. Bowie, 200 Cal.App.2d 291, 295, 19 Cal.Rptr. 217 (1962). "The trial judge . . . has no duty to give [the] defendant a legal education" Ibid. Accord, People v. Williams, 174 Cal.App.2d 364, 382, 345 P.2d 47 (1959). O'Brien v. United States, 376 F.2d 538, 542 (1st Cir. 1967), vacated on other grounds, United States v. O'Brien,

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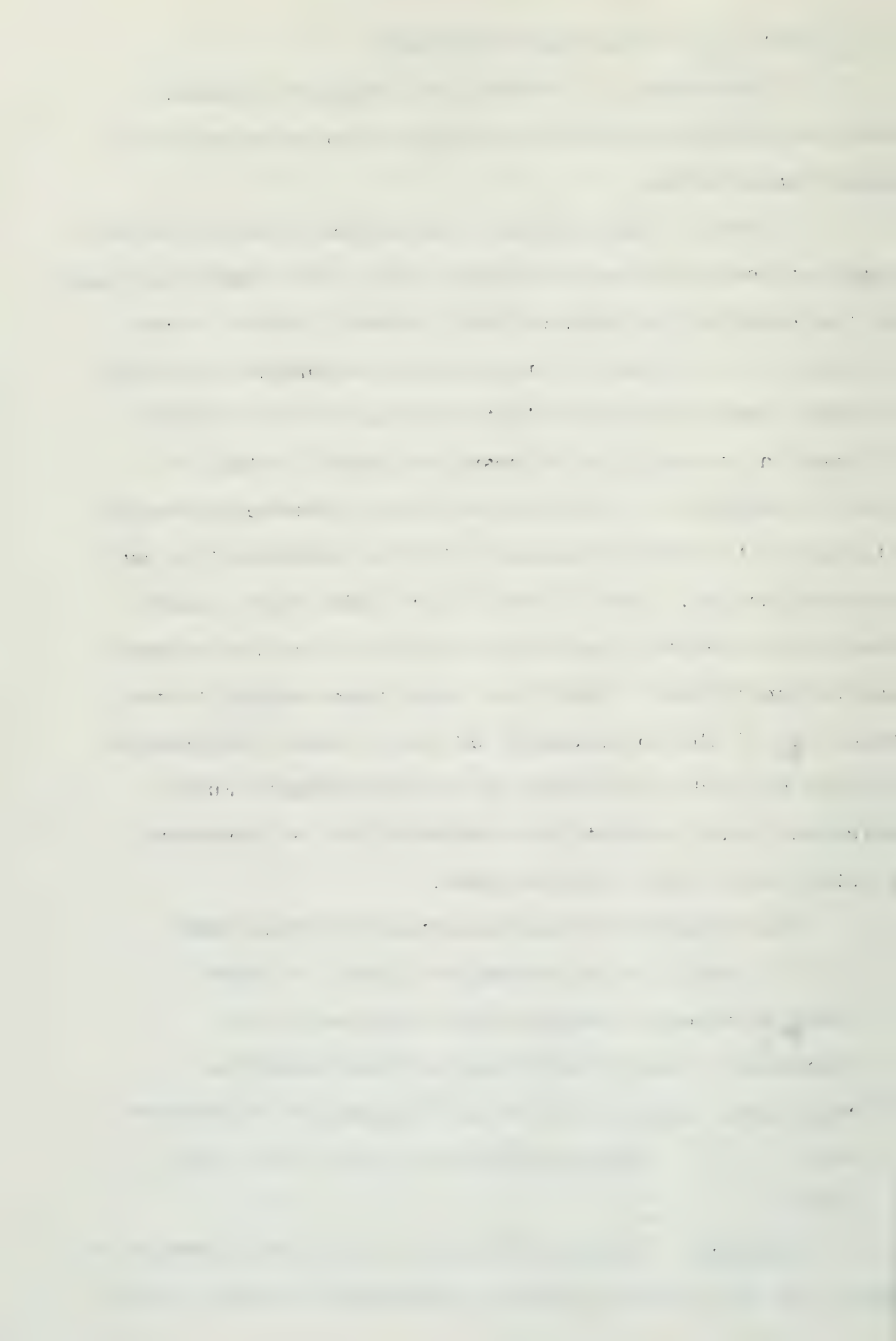
A defendant, by electing to represent himself, cannot transform the adversary process into an exercise in judicial paternalism.

Numerous constitutional rights are silently waived during the course of every criminal trial. We cannot conclude that the right waived here without judicial advice is more important to the accused or to criminal defendants generally than other commonly waived rights, including the right to challenge the composition of grand and petit juries, to object to admission of evidence on Fourth Amendment grounds, or to assert the Sixth Amendment right of confrontation by cross-examination. Must a state court judge warn a self-represented defendant whenever, by inaction, he may waive a constitutional right? Must that judge then explain to the accused all of the consequences of such a waiver so that it later may be held intelligent and understanding? Such a requirement would convert the courtroom into a classroom, the trial judge into a law lecturer.

One commentator has accurately observed that,

"It would be an impossible burden on court administration to require that every waiver be recorded. Indeed, most trial waivers cannot be registered because they do not consist of affirmative acts" Comment, 54 Calif.L.Rev. 1262, 1293 (1966).

Because it would intolerably burden trial courts to demand that they advise criminal defendants of each of their



constitutional rights and to explain the ramifications of waiver, and because such a requirement would result in a nonadversary proceeding, defendants who insist upon the self-indulgence of self-representation must be presumed competent.

Were this Court to conclude that the state procedural rule announced in Kramer should be given constitutional dimension it would not avail appellee. Bowie would not be entitled to benefit from the new law because it would necessarily be purely prospective.

Appellee asserts that the State may not press non-retroactivity as grounds for reversal for the first time upon appeal. Appellee's Brief, 24. As authority for a general rule that an appellant may not urge as a ground for reversal a theory not presented in the trial court, appellee relies upon Davis v. California, 341 F.2d 982, 986 (9th Cir. 1965); Chester v. California, 355 F.2d 778, 781 (9th Cir. 1966); and Flemings v. Wilson, 365 F.2d 267 (9th Cir. 1966).

In these cases the Court of Appeals refused to consider contentions which habeas corpus petitioners had failed to raise in the District Court. The petitioners' new contentions were unrelated to those properly raised. The matter of retroactivity, however, is integral to any new constitutional claim. Where the trial court makes new constitutional law, the State always is free to argue nonretroactivity on appeal. To permit such a significant question to go by default would indeed be a miscarriage of justice. The requirement that a petitioner first raise his contentions in the trial court forecloses no constitutional claims; the applicant has merely to file a new

petition setting forth his additional contentions. Because the State has no such remedy, and because retroactivity is integral to any new constitutional claim, the State may initially raise the purely legal question of retroactivity on appeal where, as here, the petitioner is afforded an adequate opportunity to contest the matter.

Appellee next attempts to avoid nonretroactivity by arguing that prior to 1962, when his judgment became final, federal and state decisions required that state criminal defendants be advised of their right to refuse to take the stand. He relies upon Carnley v. Cochran, 369 U.S. 506 (1962), and upon Killpatrick v. Superior Court, 153 Cal.App. 2d 146, 314 P.2d 164 (1957). Carnley held only that in a case in which the right to counsel, unless intelligently waived, was guaranteed by the Fourteenth Amendment, waiver could not be presumed from a silent record. Carnley did not impose upon state court judges a constitutional duty to admonish self-represented defendants.

Killpatrick held only that in failing to advise self-represented defendants of their right not to testify, the trial judge, under the circumstances of that case, erred as a matter of state law. Killpatrick rested solely upon California Constitution, article I, section 13. Killpatrick did not formulate a federal constitutional rule. Until the District Court announced its decision in appellee's case, no court recognized a constitutional duty to warn self-represented defendants of their rights. The matter of retroactivity, we think, cannot be avoided.

Appellee's judgment of conviction became final well before the Fifth Amendment was made applicable to the states via the Fourteenth Amendment in Malloy v. Hogan, 378 U.S. 1 (1964). For this reason, we urge that any new constitutional rule formulated in this case must be made purely prospective. See Linkletter v. Walker, 381 U.S. 618, 621-22 (1965). Further, Bowie seeks to vindicate a right itself dependent upon another right, that recognized in Malloy. He is not entitled to benefit from Malloy, for that case does not operate prospectively. Since he cannot claim the fundamental right announced in Malloy, he is in no position to claim the ancillary right asserted here.

We consider first the reasons for denying Malloy retroaction; we then review the reasons for treating similarly the right urged here. Should this Court accept our arguments in favor of pure prospectivity, any new rule enunciated in this case would be dictum. The substantive issue, then, would not be ripe for decision.

"The criteria guiding resolution of the [retroactivity] question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Stovall v. Denno, 388 U.S. 293, 297 (1967); accord, Johnson v. New Jersey, 384 U.S. 719, 727 (1966); Tehan v. Shott, 382 U.S. 406, 413 (1966);

Linkletter v. Walker, 381 U.S. 618, 636 (1965).

Where the purpose of the new rule is to enhance the reliability of the fact-finding process, it will be applied retroactively because prior convictions are of doubtful reliability. See Gideon v. Wainwright, 372 U.S. 335 (1963); Jackson v. Denno, 378 U.S. 368 (1964). Where the rule does not affect "the very integrity of the fact-finding process" and there exists no "clear danger of convicting the innocent," retroactivity is not appropriate. Johnson v. New Jersey, supra at 728. Accord, Tehan v. Shott, supra; DeStefano v. Woods, ___ U.S. ___, 88 S.Ct. 2093 (1968).

In Tehan v. Shott, the Supreme Court held that infringement of the privilege against self-incrimination by prosecutorial or judicial comment on a defendant's failure to take the stand could not be collaterally raised to attack judgments which became final prior to its condemnation of such practice in Griffin v. California, 380 U.S. 609 (1965). The high court reasoned that, since "the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth," Griffin did not affect the reliability of past procedures resulting in conviction. Tehan v. Shott, supra at 416.

The purpose of the Griffin rule is no different from the purpose of the Malloy rule; both protect the same complex of values represented by the privilege against self-incrimination. Tehan v. Shott, supra at 414. If Griffin is denied retroactive effect so must be Malloy. A recent commentator noted:

"Malloy v. Hogan, [footnote omitted] . . . is most

closely analogous to Linkletter. Presumably a conviction is not rendered unreliable because it is based on damaging testimony elicited in open court." Note, Retroactivity of Judicial Decisions: Linkletter v. Walker, 13 U.C.L.A.L.Rev. 422, 429 (1966).

Clearly, "the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, . . ." Tehan v. Shott, supra at 415.

The reliance by law enforcement on the law as it existed prior to Malloy was entirely justifiable in light of earlier decisions by the Supreme Court holding that the privilege against self-incrimination was not safeguarded against state action by the Fourteenth Amendment. Twining v. New Jersey, 211 U.S. 78 (1908); Adamson v. California, 332 U.S. 46 (1947); Cohen v. Hurley, 366 U.S. 117 (1961); Snyder v. Massachusetts, 291 U.S. 97 (1934). In Tehan, the Court acknowledged that such reliance was invited and proper. Tehan v. Shott, supra at 417.

Retroactive application of Malloy would adversely affect the administration of justice. Cf. Tehan v. Shott, supra at 418-19. "Since there is reason to suppose that the results flowing from retroactivity would be just as severe in Malloy as in Linkletter the courts would be justified in limiting the future application of Malloy to cases on direct appeal." Note, 13 U.C.L.A.L.Rev., 422, 429.

All relevant considerations militate in favor of prospectivity for Malloy. Bowie, in effect, lacks standing

to claim the indirect fruits of Malloy because he shares in its direct fruits.

The basic rationale compelling prospectivity for Malloy applies to the question of making retroactive a rule requiring trial courts to admonish self-represented defendants of their right to refuse to testify. The purpose of this warning would be to prevent unwitting or unwilling waiver of Fifth Amendment rights. This was the purpose of the admonition of the right to remain silent required by Miranda, supra. In Johnson v. New Jersey, supra, the Court refused to apply Miranda retroactively. Indeed, there is less danger of coercion in open court than in the interrogation room, and coercion in court is less likely to produce false testimony than the coercion condemned in Miranda. Thus, convictions obtained in violation of Miranda are more likely to be untrustworthy than convictions secured without the judicial advice appellee would require. The case of retroactivity is stronger here, then, than in Johnson. Cf. People v. Glaser, supra at 830-31.^{3/}

Where the proposed rule corrects a sin of omission rather than one of commission, the state's reliance upon existing law requires little justification. Law enforcement officers are not the constitutional wrongdoers here; it is the judiciary which appellee finds derelict. We submit, however, that state courts had no reason to believe that existing

3. To the extent that the requested admonition would protect those values reflected in the Fifth Amendment, the purpose of the warning is not served by applying it to final judgments. Tehan v. Shott, supra.

judicial procedures were constitutionally offensive. Certainly there was no hint of this in Wilson v. United States, supra, in Powers v. United States, supra, or in any other decision.

Appellee may demand prescient jurists; the Constitution does not. The important point is that the procedure condemned by appellee was not relied upon by the State to secure criminal convictions. Thus, it cannot be argued that illegitimate state reliance favors retroactivity.

Any retroactive ruling disrupts the administration of justice. Here there would be a windfall to an unknown number of guilty persons whose convictions are unquestionably reliable and who could not practicably be retried. The number of prisoners affected is not the exclusive measure for determining what is a permissible disruption of the administration of justice. See DeStefano v. Woods, ___ U.S. ___, 88 S.Ct. 2093 (1968). The unhappy spectacle of criminals going free for reasons unrelated to the trustworthiness of their convictions seriously damages public respect for our judicial system and supplies sufficient reason for denying retroactivity.

III

APPELLEE EFFECTIVELY WAIVED HIS CONSTITUTIONAL RIGHT TO COUNSEL.

Appellee contends that he did not effectively waive counsel. The record indicates that at the preliminary hearing in the San Francisco Municipal Court the appellee was represented by the public defender and was held to answer for trial.

Appellee thereafter appeared in Superior Court for

arraignment. At that time the appellee was asked, "Do you have an attorney or money to hire an attorney?" The appellee replied, "No, sir, I wish to exercise my constitutional prerogative, if I may, and act as my own counsel, sir." (ART^{4/} 1:4-8).

After being arraigned on the charge, the following ensued:

"THE DEFENDANT: And I pray the Court's indulgence at this time, then, in view of that, to remain here at the County Jail, if I may, instead of going down to Bruno, as I would be asking the Public Defender's office for legal advice, and so forth, and there would be the subpoenaing of records that I should like to have.

THE COURT: I have no control over the jail. I have no control over that. It's up to them.

MR. BOWIE: Well, your Honor, under the circumstances, would I be entitled to the facilities of the Public Defender's office?

THE COURT: I think you should accept the Public Defender's office right now. That's my advice to you.

THE DEFENDANT: Your Honor, with all due respect to the Court, without seeming to be pretentious or obstinate, I realize the Public Defender's office has been rather pressed for time. My experience in the past did not give them the time to look into my case or give me proper representation. I would be happy to

4. As hereinafter used, "ART" refers to the Augmented Reporter's Transcript on appeal.

coordinate with the Public Defender's office.

THE COURT: All right, let's set it for trial."

(ART 2:18 - 3:12).

Two days after this arraignment, appellee again appeared in Superior Court and the following occurred:

"THE DEFENDANT: At this time, your Honor, after due thought and consideration, I would like to waive the jury trial, submit myself to the judgment of this Court at the earliest possible trial date, if I may.

THE COURT: You want to waive a jury trial, is that it?

THE DEFENDANT: Yes, sir.

THE CLERK: Consent to that?

MR. MAURER: Yes, the People consent.

THE COURT: All right, what date?

MR. MAURER: Would you want to submit the matter on the transcript?

MR. DRESOW: Oh, don't take advantage of him that way. He doesn't understand that. Why don't you set it down for the 20th, Friday, the 20th? He doesn't understand that. Let the Court --

THE COURT: Why don't you, why don't you let the Public Defender --

MR. DRESOW: We don't want him, Judge, but I don't want him taken advantage of.

THE COURT: Why don't you let him help you on this matter? You're waiving a jury trial, and we're putting it down for --

MR. MAURER: February 20th.

MR. DRESOW: January 20th.

THE COURT: You talk to the District Attorney.

THE DEFENDANT: May I enter a plea for my hearing in Municipal Court to be given to me?" (RT 1:8 - 2:9).

Examination of the above particular facts and circumstances surrounding appellee's appearance in Superior Court compels the determination that appellee's refusal of counsel was intentional and reflected his own desire and volition.

Appellee is attacking the validity of a conviction entered in the San Francisco Superior Court over five years ago. When collaterally attacked, a judgment of a court carries with it a presumption of regularity and cannot be lightly set aside.

"Where a defendant without counsel acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of habeas corpus the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to the assistance of counsel." Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Moore v. Michigan, 355 U.S. 155, 161 (1957).

Appellee relies on Von Moltke v. Gillies, 332 U.S. 708 (1948), as requiring a constitutional formula which must be followed by a state trial judge in order to determine whether a criminal defendant has waived his right to counsel. Von Moltke imposes no such seclusions of inquiry on state

courts.

The type of judicial inquiry which Mr. Justice Black outlined in Von Moltke as necessary for a valid waiver of counsel was subscribed to by only four justices of the Court. Of course, "lack of agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases." See United States v. Pink, 315 U.S. 203, 216 (1942). Moreover, the requisites discussed in Von Moltke have not, to appellant's knowledge, been adopted by either the United States Supreme Court or any Court of Appeals as an absolute constitutional standard against which any alleged waiver of counsel must be measured. See, e.g., Twining v. United States, 321 F.2d 432, 434-35 (5th Cir. 1963).

Significantly, Von Moltke involved a federal conviction to which Rule 11 of the Federal Rules of Criminal Procedure applied. Thus, Mr. Justice Black spoke of "the solemn duty of a federal judge." 332 U.S. at 722. And the Courts of Appeal apparently have understood the requirements discussed in Von Moltke to be inspired by Rule 11 and thus limited to federal cases. See, e.g., United States v. Lester, 247 F.2d 496, 499-500 (2d Cir. 1957); Aiken v. United States, 296 F.2d 604, 606-07 (4th Cir. 1961); United States v. Smith, 337 F.2d 49, 55 (4th Cir. 1964); United States v. Diggs, 304 F.2d 929, 930 (6th Cir. 1962); Shelton v. United States, 242 F.2d 101, 112 (5th Cir. 1957).

Even though the standards discussed in Von Moltke may in fact furnish "certain guidelines for the District

Courts," even in these courts "the ultimate issue is simply whether the accused knowingly and intelligently chose to waive counsel." United States v. Smith, supra at 55.

Judge Neubarth of the San Francisco County Superior Court found in the state court proceeding seven years ago that appellee competently waived his right to counsel. Judge Neubarth was in a position to observe appellee and to evaluate his responses. Certainly, "the demeanor, the facial expression and the responses made by the accused soon may convincingly disclose to an experienced trial judge whether the accused is intelligently and understandingly waiving his constitutional right." Davis v. United States, 123 F.Supp. 407, 412 (D. Minn. 1954), aff'd, 226 F.2d 834 (8th Cir. 1955), cert.denied, 351 U.S. 912 (1956).

Appellee was a mature adult, not unfamiliar with court proceedings since he had a prior criminal conviction. Appellee, represented by counsel at the preliminary hearing, expressly informed the trial judge that he wished to exercise his "constitutional prerogative" to act as his own counsel. Thus, Patton v. State of North Carolina, 315 F.2d 643 (4th Cir. 1963), cited by appellee is clearly not applicable to the instant case since there the defendant, after dismissing his retained counsel, requested the services of another attorney. During voir dire of the jury appellee again requested the services of a lawyer. Thus, there was no express waiver of counsel as in the instant case but rather a specific and repeated request for an attorney which was ignored by the trial court. As the court there

pointed out, "We conclude that Patton could not reasonably be held to have intelligently and understandingly waived a constitutional right which he, at the very moment of being put to trial, continued to assert." Id. at 646. So, too, Carnley v. Cochran, 369 U.S. 506 (1962), is inapposite since petitioner there was never advised of his right to counsel or offered counsel.

It is clear that appellee was furnished with the services of the public defender, availed himself of those services at the preliminary hearing, and thereafter refused the further services of the public defender. He was not forced to represent himself but he chose of his own free will to do so. Unless there were grounds warranting that refusal, the failure to accept the proffered services was an effective waiver of his right to counsel. United States v. Johnson, 333 F.2d 1004 (6th Cir. 1964); Johnson v. United States, 318 F.2d 855 (8th Cir. 1963); Arrelanes v. United States, 302 F.2d 603 (9th Cir. 1962); Collins v. Heinze, 125 F.Supp. 186 (N.D. Cal. 1954), aff'd, 217 F.2d 62 (9th Cir.), cert. denied, 349 U.S. 940 (1955); People v. Ortiz, 195 Cal.App.2d 112, 15 Cal.Rptr. 398 (1961); People v. Green, 191 Cal.App.2d 280, 12 Cal.Rptr. 591 (1961); People v. O'Neill, 78 Cal.App.2d 888, 179 P.2d 10 (1947). There is no suggestion that the public defender was not competent or for any other reason was not qualified. The appellee simply chose to run his own show. By his rejection of the public defender and his action in taking over his own defense, Bowie effectively waived his right to the assistance of counsel.

When it appeared as it did to the trial court that the appellee knew what he was doing it would have been error to force counsel not of his choice upon him. Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942); Reynolds v. United States, 267 F.2d 235 (9th Cir. 1959). It is manifestly apparent that appellee, fully aware of his right to be represented by counsel, made an informed choice.

Appellee was not denied his constitutional right to counsel by the state courts. A consideration of the surrounding facts and circumstances compels the conclusion that the appellee knowingly discharged his appointed counsel and further rejected the court's advice regarding counsel.

IV

THE APPELLEE'S ADMISSIONS WERE VOLUNTARY.

Appellee now contends that the statements he made to the arresting officers were involuntary. It should initially be noted that the appellee was convicted of the offense of assault with a deadly weapon in February of 1961. Throughout the entire appellate process, including a petition for certiorari to the United States Supreme Court, appellee never claimed that the confession was involuntary. Thereafter appellee instituted a series of habeas corpus petitions in both state and federal courts (Appellant's Opening Brief, pp. 2-4). Appellee did not claim that any of his statements were involuntarily obtained in any of these proceedings until his appeal from a denial of a writ of habeas corpus in the latter part of 1966.

Before discussing the facts and circumstances surrounding appellee's statements it should be noted that Bowie's

conviction was obtained and trial completed prior to the effective date of Miranda v. Arizona, 384 U.S. 436 (1966), and Escobedo v. Illinois, 378 U.S. 478 (1964). The rulings in each of these cases are not to be applied retroactively and are therefore inapplicable here. Johnson v. New Jersey, 384 U.S. 719 (1966). Davis v. State of North Carolina, 384 U.S. 736 (1966), relied on by the appellee does not require a different result. In that case the Supreme Court, after holding that the failure to advise suspects of their rights regarding counsel and to remain silent are proper factors in considering voluntariness, went on to find that the appellee's confession was the involuntary end product of coercive influences and thus constitutionally inadmissible in evidence. In Davis the prisoner was an impoverished Negro who had been interrogated repeatedly over a period of sixteen days before he finally confessed, during which time the only persons who saw him were state authorities. The facts in Davis are clearly distinguishable from those in the present case. Bowie gave his statement to the police within a few minutes after his arrest and while still at the scene of the offense. He repeated his statement shortly after his arrival at the police station. None of the coercive factors stressed by the Supreme Court in Davis are present in this case. The only similarity was the failure to inform Bowie of his rights. It is clear however that a failure to warn accused persons of their rights is but one of many factors to be considered upon the question of voluntariness and does not itself render defective an otherwise valid confession. Johnson v. New Jersey, supra.

Here a consideration of the totality of the circumstances does not even plausibly suggest that Bowie's will was overcome but rather demonstrates that the confession was made freely, voluntarily and without compulsion or inducement of any sort.

When the police officers arrived in the lobby of the hotel they saw appellee slashing at the victim with a knife. When the officers ordered the appellee to stop and drop the knife he then turned around and came towards the officers with the knife in his hand. The officers then rushed appellee and eventually disarmed him. While the officers were outside the hotel waiting for the patrol wagon, the appellee said that he wished he had killed the man he had stabbed and that he would have killed him if the police had not arrived. When appellee was thereafter brought to the police station he repeated this statement. The officer testified that the appellee did not appear to be intoxicated, that appellee was coherent, that no promises or threats of any kind were made to the appellee, and that the statement was free and voluntary.

Although the appellee claimed that he was under the influence of alcohol any such condition was denied by the officers present at the time of the statement and hence there existed a conflict in the evidence which the trier of fact must determine. Even assuming the appellee was under the influence of intoxicating liquors, intoxication at the time of making confessions does "not deprive the confessions of the required spontaneity to make them free and voluntary."

People v. Byrd, 42 Cal.2d 200, 266 P.2d 505 (1954). The drunken condition of an accused when making a confession unless such drunkenness goes to the extent of mania does not affect the admissibility of the confession into evidence although it may affect its weight and credibility with the jury. Mergner v. United States, 147 F.2d 572 (D.C. Cir. 1945), cert.denied, 325 U.S. 850 (1945). Thus, the evidence before the trial court showed that appellee made the statement within minutes after his arrest while standing on the sidewalk in front of the hotel; the appellee was coherent and was not intoxicated; and the statement was freely given without any threats or promises. It is, therefore, submitted that the state court record adequately establishes the voluntariness of the statement.

CONCLUSION

For the foregoing reasons, appellant respectfully requests that the order granting the writ of habeas corpus entered by the court below be reversed and the proceedings dismissed.

Dated: September 5, 1968

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

Dated: San Francisco, California

September 5, 1968

EDWARD P. O'BRIEN
Deputy Attorney General
of the State of California

In the United States Court of Appeal, for the Ninth Circuit

Lawrence E. Wilson, Warden,
California State Prison,
San Quentin, California,

Appellant

v.

William J. Bowie,

Appellee

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No. 22,569

BRIEF OF APPELLEE

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FILED

AUG 14 1968

WM. B. LUCK, CLERK

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EXHIBITS

| | |
|--------------------------------------|-----------|
| Order Granting Writ of Habeas Corpus | Exhibit A |
|--------------------------------------|-----------|

Lawrence E. Wilson, Warden,
California State Prison,
San Quentin, California,

Appellant

v.

William J. Bowie,

Appellee

X
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No. 22,569

BRIEF OF APPELLEE

This is an appeal by the State from an order of the United States District Court for the Northern District of California granting appellee's petition for a writ of habeas corpus brought to test the validity of his detention by the warden of San Quentin Prison. A copy of the order and opinion are attached as Exhibit A.

EARLIER PROCEEDINGS

On January 18, 1966, the District Court denied petitioner-appellee's petition for a writ of habeas corpus. On February 15, 1967, this Court (in No. 20,846) vacated the District Court's order to allow petitioner to exhaust state remedies. The California Supreme Court denied appellee's petition for a writ of habeas corpus and the case was restored to the District Court calendar, and submitted there on the trial record, petition and memorandum filed with the California Supreme Court and

1 the earlier memorandum and brief of the State.

2 Earlier proceedings are listed in the petition
3 (p. 3, ls. 12-23). In none of these prior proceedings was
4 petitioner-appellee represented by counsel except at the prelim-
5 inary hearing and in the appeal following conviction (200 Cal.
6 App. (2d) 291).

7 The petition before the District Court alleged that
8 appellee was detained in San Quentin Prison and that the deten-
9 tion was illegal because at a trial at which he had been con-
10 victed of a violation of California Penal Code §245 (assault
11 with a deadly weapon) he was denied his rights to counsel; to
12 cross-examine and confront witnesses; to be warned that he need
13 not testify; and to have excluded from the trial incriminating
14 statements made after arrest and in response to police question-
15 ing. The petition further alleged that the entire prosecution
16 "was permeated with such unfairness as to call into question
17 the very integrity of the fact-finding process" (petition, p. 2,
18 ls. 19-21).

19 On November 16, 1967, the District Court entered
20 an Order Granting Petition for Writ of Habeas Corpus on the
21 grounds (1) that petitioner had been denied the right to con-
22 front and cross-examine Peter Coletsos, "the putative victim
23 of one of petitioner's alleged assaults"; and (2) that the trial
24 judge had failed to warn him of his right not to take the stand
25 in violation of his constitutional rights. The District Court
26 reserved judgment on the "close questions" whether petitioner

1 had been denied the right to counsel and whether involuntary
2 confessions had been admitted against him.

3 A certificate of probable cause to appeal and an
4 order staying judgment on appeal were issued. On December 5,
5 1967, respondent-appellant filed a notice of appeal.

6 Appellee's application pro se for release on his
7 own recognizance was at first denied by this Court on March 8,
8 1968, and then on June 4, 1968, a renewed motion filed by coun-
9 sel for release on his own recognizance, which was unopposed,
10 was granted and appellee was released on his own recognizance.

11 JURISDICTION

12 The jurisdiction of this Court is conferred by
13 Title 28 U.S. Code §2253.

14 STATEMENT OF FACTS

15 Petitioner was arrested in a San Francisco hotel on
16 the night of December 3, 1960, while engaged in a fight with
17 one Peter Coletsos. At the same time, petitioner's wife,
18 Irene Bowie, lay stabbed in a room in the same hotel.

19 Petitioner was charged with two counts of violation
20 of §217 of the California Penal Code (assault with intent
21 to commit murder), one count each as to Coletsos and Mrs. Bowie.

22 He was represented at the preliminary examination
23 by the Public Defender. At the trial in Superior Court, he
24 represented himself. At the trial, the transcript of the
25 preliminary examination was admitted into evidence under circum-
26 stances which will be set forth hereafter.

1 Coletsos and Mrs. Bowie testified at the prelimin-
2 ary examination; neither appeared at the trial.

3 At the preliminary examination, Coletsos testified
4 that he had never seen petitioner before and that he was not
5 acquainted with Mrs. Bowie (R.T. p. 8, ls. 25-26; p. 10, l.
6 15, ls. 22-24); that petitioner, without provocation of any
7 kind, came to him in the hotel hallway, began quarreling with
8 him, and kicked at him (R.T. p. 25, ls. 4-13). Then, he
9 testified, he went to his room and obtained a hammer to "have
10 something to protect myself" (R.T. p. 12, ls. 12-20; p. 15,
11 ls. 11-25; p. 18, ls. 1-5), and then he went downstairs (R.T.
12 p. 8, l. 18). Coletsos further testified that thereafter
13 petitioner went to his room and "got something else and came
14 down after me." (R.T. p. 13, ls. 11-12.)

15 The two men fought in the lobby, Coletsos armed
16 with his hammer and petitioner with a knife. (R.T. p. 15, ls.
17 3-18.) It cannot be ascertained from Coletsos' testimony how
18 he knew that petitioner had gone to his room if, as he
19 testified, he had preceded petitioner downstairs to the hotel
20 lobby.

21 Mrs. Bowie testified that on the night in question
22 petitioner had been taking pills for headache and had been
23 drinking, that the pills and the liquor together caused him to
24 "blackout", and that he had had a number of such "blackouts".
25 (R.T. p. 20, ls. 2-10; p. 22, ls. 6-16.) She testified that
26 she could not stand another such seizure, that she had "made a

1 vow" to commit suicide if petitioner had another blackout, and
2 that she had stabbed herself with a Marine bayonet. (R.T. p.20,
3 ls. 2-5, p. 14, ls. 14-26.) She testified that she had told
4 police officers that petitioner had stabbed her because she
5 feared "being put in the San Francisco General Hospital where
6 they put would-be suicides." (R.T. p. 21, ls. 2-12.) At the
7 conclusion of her testimony, the Judge stated to her, "I want
8 you to know that I don't believe one word you said." (R.T. p.23
9 1. 9.)

10 Officer Finnegan testified that, when he arrived at
11 the hotel, he saw petitioner make a slashing motion toward
12 Coletsos and that petitioner had a pocket-knife in his hand.
13 (R.T. p. 24, ls. 6-8.) Four officers handcuffed him while
14 "he was cursing and screaming." (R.T. p. 24, ls. 24-25.) In
15 response to the officers' questions immediately following his
16 arrest and later in the police station, petitioner said, "I
17 would have killed him if you had not stopped me," and "I wish
18 I could have killed you guys, too." He also said he stabbed
19 his wife because "she wouldn't let me sleep." (R.T. p.25,
20 ls. 2-23.) The police did not inform petitioner of his right
21 to counsel or of his right to remain silent. (Ibid.) The
22 officer testified that during a very brief conversation with
23 Mrs. Bowie, as she lay wounded in the hotel room, she asked,
24 "How is Bill?" (R.T. p. 28, ls. 13-20.)

25 Petitioner was held to answer. Following is the
26 entire transcript of the arraignment procedure in Superior
Court (A.R.T. pp. 1-3):

The Clerk: William Bowie, for arraignment.
Come right over here. Do you have an attorney
or money to hire an attorney?

The Defendant: No, sir, I wish to exercise my
constitutional prerogative, if I may, and act as
my own counsel, sir.

The Clerk: Here's a copy of the Information.

The Defendant: At this time I wish to plead
not guilty, your Honor.

The Clerk: You have to be arraigned first.

The Defendant: Sir?

The Clerk: William Bowie--Is that the way
you pronounce your name?

The Defendant: Bowie.

The Clerk: William Bowie, you are charged in
an Information with the crime of felony, assault
with a deadly weapon with intent to commit murder,
in two counts. Is that your true name, William
Bowie?

The Defendant: Right.

The Clerk: Waive reading of the Information?

The Defendant: I wish to waive, yeah.

The Clerk: Are you ready to plead at this time?

The Defendant: I wish to enter a plea of not
guilty.

The Clerk: To each count?

The Defendant: Not guilty.

I do not wish to waive time.

The Court: You want an early trial, do you?

The Defendant: The earliest possible date
your Honor can find ample time to present the
evidence for judgment to your Court.

The Court: I assume you want a jury trial,
do you?

The Defendant: Well, a jury trial would be
next in line after the Court's judgment here.
I'd prefer to have it heard in Superior Court
because I believe that it can be brought down
from where it stands at the present time.

The Court: I mean do you want a jury trial,
or do you want the Court to hear your case?
You're entitled to a jury trial, if you want it.

The Defendant: I will take a jury trial, then,
your Honor.

The Court: Very well.

The Defendant: And I pray the Court's indul-
gence at this time, then, in view of that, to
remain here at the County Jail, if I may, instead
of going down to Bruno, as I would be asking the

Public Defender's office for legal advice, and so forth, and there would be the subpoenaing of records that I should like to have.

The Court: I have no control over the jail. I have no control over that. It's up to them.

Mr. Bowie: Well, your Honor, under the circumstances, would I be entitled to the facilities of the Public Defender's office?

The Court: I think you should accept the Public Defender's office right now. That's my advice to you.

The Defendant: Your Honor, with all due respect to the Court, without seeming to be pretentious or obstinate, I realize the Public Defender's office has been rather pressed for time. My experience in the past did not give them the time to look into my case or give me proper representation. I would be happy to coordinate with the Public Defender's office.

The Court: All right, let's set it for trial.

Mr. Maurer: February 9th, your Honor?

The Court: February 9th.

The Defendant: Thank you, your Honor."

At the petitioner's request, the case was advanced from February 9th to January 13, 1961, and the following colloquy occurred when the case was called on January 13th:

"The Defendant: At this time, your Honor, after due thought and consideration, I would like to waive the jury trial, submit myself to the judgment of this Court at the earliest possible trial date, if I may.

The Court: You want to waive a jury trial, is that it?

The Defendant: Yes, sir.

The Clerk: Consent to that?

Mr. Maurer: (prosecutor) Yes, the People consent.

The Court: All right, what date?

Mr. Maurer: Would you want to submit the matter on the transcript?

Mr. Dresow: [Public Defender] Oh, don't take advantage of him that way. He doesn't understand that. Why don't you set it down for the 20th, Friday, the 20th? He doesn't understand that. Let the Court--

The Court: Why don't you, why don't you let the Public Defender--

Mr. Dresow: We don't want him, Judge, but I don't want him taken advantage of.

The Court: Why don't you let him help you on this matter? You're waiving a jury trial, and we're putting it down for--

Mr. Maurer: February 20th.

Mr. Dresow: January 20th.

The Court: You talk to the District Attorney."

(R.T. p. 1, l. 4 to p. 2, l. 7.)

On January 20th, the proceedings began as follows:

"The Clerk: The matter of William Bowie, for decision. He had waived a jury trial and submitted it on the transcript.

The Defendant: Yes.

The Clerk: We haven't received that transcript.

The Court: He didn't receive it?

The Clerk: Fitzgerald Ames--

The Court: He never received it?

The Defendant: I don't know--they were over there when I gave it to--

The Clerk: He's got it.

The Court: Oh, he has it?

You want a hearing now, is that right?

The Defendant: Yes.

(The transcript of the preliminary hearing was received, reading as follows:) . . ."

(R.T. p. 5.)

After the transcript was received, the following colloquy occurred:

"The Court: All right. Call the witnesses. You sit right at the counsel table.

Mr. Floyd: [Prosecutor] In any case, the matter was submitted on the transcript.

The Court: Did you submit the case on the transcript? Did you intend that I read this transcript and make a decision from that, or did you want to testify?

The Defendant: Your Honor, I want the witnesses present, with the Court's approval, to question them, to have the privilege of cross-examining them, and let the Court decide the matter after that.

The Court: Very well."

(R.T. p. 31, ls. 1-12.)

The Prosecutor, Mr. Floyd, then called Officer Finnegan, who repeated in substance his testimony at the preliminary examination (R.T. p. 31, l. 15-p. 40, l. 26).

The second witness was Officer Mulligan, who testified that when he arrived at the hotel, other officers "already had [petitioner] on the floor. . . ." (R.T. p. 42, ls. 12-13). Officer Mulligan participated in questioning petitioner "outside the hotel, waiting for the patrol wagon, and then again in the cell inside when we had him in the station." (R.T. p. 4, ls. 23-25.) He testified that petitioner "said he wished he had killed the main he had stabbed and he'd like to have gotten one officer also." (R.T. p. 43, ls. 11-13.) At the conclusion of Officer Mulligan's testimony, the following occurred:

"Mr. Floyd: We attempted to subpoena Mr. Coletsos, your Honor. He's not in Court this morning.

The Court: You want to testify, don't you? .

The Defendant: I do, your Honor.

The Court: All right.

William J. Bowie,

the Defendant, called as a witness in his own behalf, being first duly sworn, testified as follows:

The Court: All right, you just tell us your story.

The Defendant: May I read it from my transcript, your Honor?

The Court: Very well."

(R.T. p. 44, l. 22-p. 45, l. 7.)

Petitioner then testified, apparently from a prepared statement, since he had not previously testified and there was no "transcript." He said that on the night in question he had

drunk two bottles of wine and had begun on a third, that his wife had told him "some damn Dago had insulted her," and that his emotional reaction, due to a terrific headache, together with numerous aspirin pills and the wine, caused him to become "disoriented" so that his memory of the events that followed was not clear (R.T. p. 45, l. 26 to p. 46, l. 16).

The trial judge interrupted his narrative to inquire as to the trouble with his head and whether he did things when suffering such a seizure that "you should not do." (R.T. p. 26, ls. 17-24.) Petitioner replied that he did do such things, that liquor increased the pain in his head and that he could not tolerate it (R.T. p. 46, l. 25 to p. 47, l. 9).

The trial judge then inquired, "Have you been in any other trouble?" (R.T. p. 47, l. 10.) Petitioner replied that he had received one year's probation on a forgery charge but had never been "in trouble or . . . anything of violence." (R.T. p. 47, ls. 11-22.)

Following a discussion between the Judge and the prosecutor concerning the forgery charge, the judge said to petitioner, "You might have killed your wife. You didn't intend to do that, did you?" (R.T. p. 48, ls. 18-23.) The judge then asked, "What do you think we should do for you for your protection?" (R.T. p. 48, ls. 24-25.) Petitioner, without replying, resumed his narrative statement.

In summary, he testified that Coletsos kicked and banged on his door, he opened it and was immediately attacked,

1 that Coletsos then left and returned very shortly with a ham-
2 mer and renewed the attack, and that he had never seen Colet-
3 sos before. He testified further that Coletsos eventually
4 went downstairs and that when he re-entered his room, he found
5 his wife bleeding. He ran downstairs for help and remembered
6 nothing thereafter until he found himself in handcuffs outside
7 the hotel. He had no memory of ever having a knife in his
8 hand (R.T. p. 50, l. 3 to p. 51, l. 13).

9 Immediately following the conclusion of petitioner's
10 testimony, the trial court found him guilty of one count of
11 violation of California Penal Code §245 (assault with a deadly
12 weapon), a lesser offense included in the original charge. The
13 conviction was as to the assault on Coletsos; he was found not
14 guilty as to the other charge with respect to his wife.

15 QUESTIONS PRESENTED

16 I. Whether at the trial the admission into evi-
17 dence of the transcript of the preliminary examination violated
18 appellee's right to confront and cross-examine the witness
19 against him.

20 II. Whether appellee was denied due process in
21 that he was permitted by the trial judge to give incriminating
22 testimony without being warned of his right not to testify.

23 III. Whether the entire proceeding from the ar-
24 rest to the conviction ~~as~~ permeated with such unfairness as to
25 call into question the very integrity of the fact-finding pro-
26 cess and thus to require a finding that appellee was deprived
of due process of law.

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ARGUMENT

I.

The Admission at the Trial of the Preliminary-
Hearing Transcript Violated Appellee's Right
to Confront and Cross-Examine the Witness
Against Him.

1. This case is controlled by Barber v. Page.

On April 23, 1968, the United States Supreme Court decided the case of Barber v. Page, ____ U.S. ____, 88 S. Ct. 1318, 36 L.W. 4329, which controls this case.

Barber, like this case, involved an appeal through federal habeas corpus on the question of whether a preliminary hearing transcript could, consistent with the Sixth and Fourteenth Amendments, be used against a defendant in a state criminal prosecution when the witness at that hearing was not produced at trial and where the state had made no substantial effort to obtain his presence. In a unanimous opinion, the Supreme Court held that such testimony could not be admitted without violating petitioner's right to confront and cross-examine his accusers.

The Court decided that, while there may be an exception permitting the introduction at trial of testimony of a witness who cannot be produced at trial, "a witness is not 'unavailable' for the purpose of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial."

Barber v. Page, supra, 88 S. Ct. at 1322,
36 L.W. at 4330

1 In so holding, the Court said:

2 "The right to confrontation is basically a trial
3 right. It includes both the opportunity to cross-
4 examine and the occasion for the jury to weigh the
5 demeanor of the witness. A preliminary hearing is
6 ordinarily a much less searching exploration into
7 the merits of a case than a trial, simply because
8 its function is the more limited one of determining
9 whether probable cause exists to hold the accused
10 for trial. While there may be some justification
11 for holding that the opportunity for cross-examination
12 of testimony at a preliminary hearing satisfies the
13 demands of the confrontation clause where the wit-
14 ness is shown to be actually unavailable, this is
15 not, as we have pointed out, such a case."

16 Barber v. Page, supra, 88 S. Ct. at 1322,
17 36 L. W. at 4331.

18 Nor is this such a case. Before former testimony
19 of a witness alleged to be unavailable can be introduced, the
20 State must make a showing of good faith or due diligence in
21 attempting to produce him.

22 Penal Code §686(3);

23 Barber v. Page, supra;

24 People v. Ward (1895) 105 Cal.
25 652, 656;

26 People v. Redston (1956) 139
Cal. App. (2d) 485.

In Barber, the State at least located the witness
in a federal prison outside the State of trial. Here, even that
effort was not made. Mere issuance of a subpoena without some
further showing of actual unavailability does not satisfy the
Sixth and Fourteenth Amendments.

Holman v. Washington (CA 5, 1960) 364
F.(2d) 618, 623

As the District Court in this case pointed out

1 (Op. p. 3) and as the trial transcript makes clear (R.T.44-45),
2 no attempt was made at trial to explore and no explanation was
3 given as to why the witness was unavailable, nor was there any
4 showing that a continuance would not have secured his presence.
5 "The constitutional right to confrontation and cross-examination
6 . . . cannot be sidestepped because it happens to be convenient
7 for one of the parties."

8 Holman v. Washington, supra, 364
9 F.(2d) at 623.

10 2. The transcript was considered by the trial court
11 and its use was prejudicial.

12 Appellant's brief completely ignores the effect of
13 Barber v. Page, supra, on this appeal, arguing instead that the
14 preliminary hearing transcript was not considered by the trial
15 court and that even without the transcript there was sufficient
16 other evidence to convict. Neither contention can be sustained.

17 A. The Transcript Was Read and Considered.

18 Appellant's argument that the preliminary hearing
19 transcript was not considered by the trial court is made in the
20 face of (1) the clear language in the trial transcript that, "The
21 transcript of the preliminary hearing was received, reading as
22 follows: . . ." (R.T. 5, after which the entire preliminary hear-
23 ing transcript is set out); (2) the Clerk's statement (not sup-
24 ported by the prior record) that "[Mr. Bowie] had waived a jury
25 trial and submitted it on the transcript" (R.T. 5); and (3) an
26 earlier decision by the California Court of Appeals upholding

1 the contention the State was then making that "the [preliminary
2 hearing] transcript was admitted . . ." People v. Bowie, (1962)
3 200 Cal. App. (2d) 291, 293, 294.

4 It was, of course, the duty of the trial court to
5 read the transcript. The argument that it was not read "could
6 have validity only if it was shown affirmatively by the record
7 that the court had neglected to read the transcript. It is as
8 unreasonable to argue that the court did not read the transcript
9 as it would be to make the bland assertion that the court did
10 not pay attention to the testimony of the witnesses."

11 People v. Heath (1955) 131 Cal. App.
12 (2d) 172, 174;

13 People v. Chamberlain (1966) 242
14 Cal. App. (2d) 594, 597;

15 C.C.P. §1963(15).

16 The facts argued in appellant's brief fall far
17 short of the "affirmative showing" which it is required to make.
18 Upon analysis, appellant's argument consists wholly of highly
19 ambiguous transcript references which, at best, leave open such
20 questions as who had copies of the transcript at the outset of
21 trial (R.T. 5) and whether the trial was at any point continued
22 from January 20th to January 27, 1961. (See R.T. 5, where date
23 of trial is indicated as January 20th, and R.T. 55, where Jan-
24 uary 27th is indicated as the then current date.) Certainly
25 these reference do not "amply demonstrate," as appellant asserts
26 (Brief of Appellant, p. 12) that the trial judge "totally dis-
regarded the transcript of the preliminary hearing."

1 In fact, while there is no evidence that the trans-
2 cript was not considered, there are several indications that it
3 was. For example, the trial judge found respondent not guilty
4 on the charge relating to his wife. It is incredible that he
5 did so without reading the evidence relating to that charge,
6 and particularly the wife's own testimony at the preliminary
7 hearing that she had stabbed herself (R.T. 19). Moreover, res-
8 pondent utilized the transcript to cross-examine witnesses (R.
9 T. 39,40). On one occasion, when respondent attempted to cross-
10 examine Officer Finnegan on the basis of a page reference to
11 Coletsos' prior testimony, the Court pointed out, ". . . I don't
12 think this officer knows very much about this," indicating at
13 least a familiarity with the transcript (R.T. 39).

14 B. Its Use Was Prejudicial.

15 The State's contention that there is sufficient
16 other evidence to convict without the preliminary hearing trans-
17 cript depends upon the argument that the transcript was not ad-
18 mitted or considered by the trial court. If the transcript was
19 considered, its use was clearly prejudicial and material and
20 constituted reversible error regardless of the other evidence.
21 "[B]efore a federal constitutional error can be declared harm-
22 less, the court must be able to declare a belief that it was
23 harmless beyond a reasonable doubt. "

24 Chapman v. California (1967)
25 386 U.S. 18, 24.

26 Since the transcript contained, among other things, the testimony

1 of the alleged victim, who was the chief witness against the
2 accused, its consideration by the trial court was harmful.

3 "The primary object of the [Sixth
4 Amendment right of confrontation and cross-
5 ex-parte affidavits . . . being used against
6 the prisoner, in lieu of a personal examina-
7 tion and cross-examination of the witness,
8 in which the accused has an opportunity, not
9 only of testing the recollection and sifting
10 the conscience of the witness, but of com-
11 pelling him to stand face to face with the
12 jury in order that they may look at him and
13 judge by his demeanor upon the stand, and the
14 manner in which he gives his testimony, whether
15 he is worthy of belief."

16 Mattox v. U.S. (1894) 156 U.S. 327, 242-3,
17 15 S. Ct. 337, 339;

18 Douglas v. State of Alabama (1965) 380
19 U.S. 415, 85 S. Ct. 1074.

20 Appellant insisted on more than one occasion that
21 he wanted to confront and cross-examine the witnesses against
22 him. His reasons for such insistence must have been precisely
23 the reasons set forth in Mattox. Use of the transcript de-
24 prived petitioner of his right to have Coletsos "stand face
25 to face" with the trier of fact and to have the trial judge
26 make an independent judgment, after cross-examination, as to
whether Coletsos was "worthy of belief."

21 The trial judge, had he seen Coletsos under cross-
22 examination, might well have pondered his credibility. Coletsos'
23 story was incredible, unless petitioner was insane at the time
24 the offense was committed. Coletsos stated that he had never
25 laid eyes on petitioner or his wife; yet he said that he
26 did not provoke an attack, but that petitioner for no reason

1 kicked him and followed him with a knife. Coletsos was so
2 frightened, he testified, that following the kicking he went
3 to his room to get a hammer and had the hammer in his hand at
4 the time of petitioner's alleged knife attack. Either peti-
5 tioner was insane at the time, in making an unprovoked assault
6 on a total stranger, or Coletsos was lying. The defense of
7 insanity is also suggested by the testimony of petitioner's
8 wife as to his "black-outs" and by her query to Officer Finnegan
9 after she was stabbed, allegedly by petitioner, "How is Bill?"
10 The possibility that Coletsos was lying as to who was the
11 aggressor is also suggested by the inconsistency of his testi-
12 mony as to when he obtained his hammer and petitioner obtained
13 his knife. Cross-examination, even by petitioner representing
14 himself, might well have established either self-defense or
15 his lack of criminal intent by reason of insanity.

16 Even if the transcript was not formally ad-
17 mitted, Coletsos' prior testimony--with which the trial court
18 apparently was familiar--was used by respondent to cross-
19 examine Officer Finnegan (R.T.39), and was before the trial
20 court in that posture.

21 Without the transcript of preliminary hearing,
22 the remaining evidence consists of the arresting officer's
23 testimony and respondent's involuntary confessions, and his
24 equally inadmissible trial testimony.

25 The arresting officer was Officer Finnegan,
26

1 who did not see appellee actually strike Coletsos and who knew
2 nothing as to how the struggle began or who was the aggressor.

3 It is manifestly impossible for the trier of the
4 facts to isolate from the mass of improperly admitted and
5 highly prejudicial evidence the bare facts of the brief episode
6 witnessed by Officer Finnegan. It cannot, therefore, be said
7 that no miscarriage of justice resulted from the improper
8 admission of evidence.

9 California Constitution Art. VI, §4-1/2;

10 People v. Burness (1942) 53 Cal.
11 App. (2d) 214.

12 II

13 The District Court Correctly Ruled
14 that Appellee Had a Right to Be
Warned that He Need Not Testify.

15 The State appears to argue that there is no
16 federal constitutional duty on a State trial judge to warn an
17 unrepresented criminal defendant that he need not take the
18 stand, and that even if there is such a duty, the requirement
19 cannot be applied retroactively. Both arguments are without
20 foundation, and, in addition, the second is raised for the first
21 time on this appeal.

22 1. Appellee had a constitutional right to be
23 warned that he need not testify.

24 Appellant does not dispute that a defendant in a
25 state criminal prosecution must be warned of his constitutional
26 right not to take the stand. Rather, the State argues that the

1 cases cited by the District Court do not support such a right.
2 (Appellant's Brief, pp. 15-16.) The State's tactic of thus
3 failing to admit what it will not deny is at the least mislead-
4 ing and exhibits an exceedingly narrow view of what constitutes
5 substantiating authority.

6 It is hard to see why a defendant should on the
7 one hand have a right to be warned that he need not testify
8 before a grand jury (U.S. v. Luxemborg (C.A. 6, 1967) 374 Fed.
9 (2d) 241, 246), or in a trial for criminal contempt (Cliett v.
10 Hammonds (C.A. 5, 1962) 305 Fed. (2d) 565, 570), while on the
11 other hand he should not have that right at a trial for assault
12 with intent to commit murder. A grand jury proceeding is more
13 informal and arguably less inherently coercive than a formal
14 trial (U.S. v. Cleary (C.A. 2, 1959) 265 Fed. (2d) 459, cert.
15 den. (1959) 360 U.S. 936), so that if the warning must be given
16 there, it would seem to follow a fortiori that it must be given
17 at the trial itself. California of course has decided the issue
18 as a matter of State law in favor of requiring the warning.

19 People v. Glaser (1965) 238 Cal.
20 App. (2d) 819;

21 People v. Kramer (1964) 227 Cal.
22 App. (2d) 199;

23 Killpatrick v. Superior Court (1957) 153
24 Cal. App. (2d) 146.

25 The United States Supreme Court has dealt with the same question
26 as a matter of Federal Constitutional law in Carnley v. Cochran
(1961) 369 U.S. 506 (discussed more fully in Section II, 2.
infra).

1 In any event, it would be anomalous at this late
2 date, when the right to such warnings has been extended to all
3 phases of the criminal case, if the right to be warned were
4 withheld during the trial itself. The direction of the law in
5 recent years has been to extend procedural guarantees from the
6 "mansion" of the courtroom to the "gatehouse" of the police
7 station, not to roll them back.

8 See Kamisar, "Equal Justice in the
9 Gatehouses and Mansions of American
10 Criminal Procedure," in Criminal
11 Justice in Our Time (1965).

12 2. There is no retroactivity issue in this case.

13 The State's contention that this right, of an
14 unrepresented defendant to be warned before he testifies, is
15 not retroactive is based on the erroneous idea that the right
16 is derived solely from Malloy v. Hogan (1964) 378 U.S. 1.
17 However, both the United States Supreme Court in Carnley v.
18 Cochran, supra, and the California Court of Appeals in
19 Killpatrick v. Superior Court, supra, had considered and ruled
20 on this question before appellee's conviction became final in
21 1962. There is thus no retroactivity issue in this case.

22 In Carnley, the U.S. Supreme Court in a habeas
23 corpus proceeding reversed conviction on the following facts:
24 An illiterate man was tried in a Florida court, without counsel,
25 and was convicted of child molesting. While the defendant was
26 advised that he need not testify, he was not told what
consequences might follow if he did testify. He chose to

1 testify and, as here, his criminal record was brought out on
2 cross-examination. That case is similar to the instant case
3 in demonstrating the need for counsel, but here, unlike Carnley,
4 appellee was not even advised of his right to remain silent. In
5 passing on the question of the right of an unrepresented
6 defendant to be warned of the possible consequences if he
7 testified, the Court said:

8 "Despite the allegation in respondent's return
9 'that the petitioners were carefully instructed
10 by the trial court with regard to the rights
11 guaranteed by both the Constitution of Florida
12 and the Constitution of the United States...
13 'it appears that, while petitioner was advised
14 that he need not testify, he was not told what
15 consequences might follow if he did testify.
16 He chose to testify and his criminal record
17 was brought out on corss-examination. For
18 defense lawyers, it is commonplace to weigh
19 the risk to the accused of the revelation on
20 cross-examination of a prior criminal record,
21 when advising an accused whether to take the
22 stand in his own behalf; for petitioner, the
23 question had to be decided in ignorance of
24 this important consideration." Id. at 511.

17 Here appellee, who was in the same helpless position,
18 was not warned of either his right not to testify or of the
19 consequences of his testifying, and here, too, appellee's prior
20 record came out during his testimony.

21 In Killpatrick v. Superior Court, supra, decided in
22 1957, the petitioner was also an unrepresented defendant who had
23 been convicted partly on the basis of testimony he gave without
24 being warned of his right not to testify. The Court in that
25 case reversed the conviction, stating:
26

1 "The privilege [against self incrimination]
2 cannot be made truly effective unless the
3 defendant in a criminal case who is not
4 represented by counsel is advised by the
Court of the existence of the privilege
whenever such advice appears to be neces-
sary." Id. at 149.

5 Citing and quoting People v. O'Bryan, (1913) 165
6 Cal. 55, 62, the Court then ruled that since the defendant had
7 not been represented and was not warned, his testimony could
8 not be considered "in any fair sense voluntary."

9 Thus both federal and state law prior to 1962 had
10 resolved the problem of the unrepresented defendant who is not
11 warned of his right not to testify and retroactivity is not
12 properly an issue in this case.

13
14 3. Appellant is precluded from arguing that
15 the right to such warnings is not retroactive.

16 Assuming, arguendo, that Malloy v. Hogan, supra,
17 is the sole source of an unrepresented defendant's right to be
18 warned of his right not to testify, the non-retroactivity of
19 Malloy cannot be raised on this appeal.

20 For the first time on this appeal, the State presses
21 the point that the rule that failure to warn an unrepresented
22 defendant at trial of his right not to testify should be
23 applied prospectively only. Tehan v. Shott, 382 U.S. 406, on
24 which appellant relies, was decided on January 18, 1966. This
25 was before the appeal to this Court from denial of the 1966
26 writ of habeas corpus; before respondent's petition to the

1 California Supreme Court; and of course long before the District
2 Court wrote the opinion to which appellant now takes exception.
3 "[E]xcept when necessary to prevent a manifest miscarriage of
4 justice, . . . an appellant may not urge as a ground for
5 reversal a theory which he did not present in the trial court."

6 Chester v. California (C.A. 9, 1965)
7 355 Fed. (2d) 778, 781;

8 Davis v. California (C.A. 9, 1965)
9 341 Fed. (2d) 982, 986;

10 Flemings v. Wilson (C.A. 9, 1966)
11 365 Fed. (2d) 267.

12 Appellant makes no showing here, nor could it show,
13 that it must be permitted to press its retroactivity contention
14 in order to obviate a manifest miscarriage of justice. Indeed,
15 a reading of this trial transcript reveals a shocking series of
16 procedural abuses of an unrepresented defendant, as more par-
17 ticularly set out in part III of this brief, infra. If anyone
18 was the subject of a miscarriage of justice in this case, it
19 certainly was not the State.

20 Moreover, the issue of retroactivity itself is not
21 nearly so clear as appellant contends. The mere fact that the
22 no-comment role of Griffin v. California (1965) 380 U.S. 609
23 is not retroactive (see Tehan, supra) does not mean that failure
24 to warn an unrepresented defendant is not retroactive. "[R]etro-
25 activity or nonretroactivity of a rule is not automatically de-
26 termined by the provision of the constitution on which the dic-
tate is based."

1 Johnson v. New Jersey, 384 U.S. at 728.

2 Compare Gideon v. Wainright (1963) 372 U.S. 335
3 (retroactive) with Escobedo v. Illinois (1964) 328 U.S. 478
4 (non-retroactive).

5 In weighing whether to apply a given rule retro-
6 actively or prospectively, the courts consider essentially three
7 factors:

8 (1) Whether the new rule affects the question of
9 guilt or innocence: (2) the reliance placed upon prior decisions;
10 and (3) the effect retroactivity would have upon the administra-
11 tion of justice.

12 As to the first factor, certainly the testimony of
13 an unrepresented, unwarned defendant, whose competence at the
14 time of the alleged offense and whose mental stability at the
15 time of trial are both in grave doubt, cannot form a reliable
16 basis for a judgment on the basis of guilt or innocence.

17 Neither lower court reliance on past decisions nor
18 effect on administration of justice is persuasive here since
19 there is, as the District Court noted, a dearth of decisional
20 authority on the point whether warnings are required, and since,
21 as the District Court also noted, the situation here presented
22 is unlikely to recur often (Op. p. 5).

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III.

The Entire Proceeding From the Arrest
to the Conviction Was Permeated with Such
Unfairness as to Call into Question the
Very Integrity of the Fact-Finding Process
and Thus to Require a Finding that Appellee
was Deprived of Due Process of Law.

Although appellant's brief and the District Court's order focus on two central issues, these issues can be fully understood only against the background of proceedings which constitute in many other ways a serious miscarriage of justice.

1 1. Petitioner Was Denied Representation
2 by Counsel.

3 The District Court hinted at one of these problems
4 when it indicated that, "The record presents a close question
5 concerning the waiver of petitioner's right to counsel." Op.
6 p. 6.)

7 A. Appellee did not waive counsel.

8 Petitioner, following his purported waiver of
9 counsel, requested the assistance of the Public Defender. While
10 requesting legal assistance, he stated, "I want to represent
11 myself, because the Public Defender did not do a good job at
12 the preliminary examination." When the trial judge suggested
13 that he should accept counsel anyway, the Public Defender
14 present said, "We don't want him, Judge." On the facts, this
15 is no waiver. Petitioner was quite aware of his own inability
16 to defend himself and so stated to the Court; yet the Court made
17 no inquiry as to why petitioner felt he would not receive
18 adequate representation by the Public Defender, no inquiry as
19 to why the Public Defender did not want to represent him, and
20 made no response to petitioner's request for assistance of
21 counsel, either by requiring the Public Defender to advise him
22 without representation or by suggesting a change in the Deputy
23 Public Defender assigned to the case, or by assisting petitioner
24 to find counsel outside the Public Defender's office.

25 In the absence of any inquiry into, or exploration
26 of, the relationship between petitioner and the Public Defender's

1 office, and in the light of petitioner's request for legal
2 assistance, the records suggest nothing more than a falling out
3 between the client and a particular lawyer, that is, the Deputy
4 Public Defender who had been representing him. The record does
5 not support a finding of waiver.

6 B. There is no evidence of "an intelligent
7 and competent waiver" of counsel.

8 At no time did the trial judge perform the duty
9 imposed on him by petitioner's constitutional right to be
10 represented by counsel, a right which "invokes of itself the
11 protection of a trial court in which the accused--whose life or
12 liberty is at stake--is without counsel. This protecting
13 duty imposes the serious and weighty responsibility upon the
14 trial judge of determining whether there is an intelligent and
15 competent waiver by the accused. While an accused may waive the
16 right to counsel, whether it is a proper waiver should be clearly
17 determined by the trial court, and it would be fitting and
18 appropriate for that determination to appear upon the record."

19 Johnson v. Zerbst (1938) 304 U.S. 458
20 58 S. Ct. 1019;

21 Fay v. Noia (1963) 372 U.S. 391, 83 S.
22 Ct. 822

23 People v. Mattson (1958) 51 Cal. (2d) 777.

24 Discharge of this "protecting duty" requires "a
25 penetrating and comprehensive examination of all of the circum-
26 stances under which a plea is tendered" including inquiry into
the background of the accused and an explanation to him by the
Court of the procedural problems and of "the nature of the

1 charges, the statutory offenses included within them, the range
2 of allowable punishments thereunto, possible defenses to the
3 charges and circumstances in mitigation thereof, and all other
4 facts essential to a broad understanding of the whole matter."

5 Von Moltke v. Gillies (1948) 332 U.S.
6 708, 724; 68 S. Ct. 316.

7 The trial transcript makes it clear that petitioner
8 required the services of counsel in protecting his rights and in
9 formulating and presenting the defenses available and that he
10 himself had no knowledge as to court procedure or any real
11 understanding of what was happening during his trial.

12 That petitioner required the trial court's
13 protection became clear immediately following his purported
14 waiver at the time of arraignment. He did not know that he was
15 entitled to a jury trial. Despite the purported waiver, he
16 asked the help of the Public Defender. He thought that there
17 was some other procedural stage to be gone through prior to a
18 jury trial. He understood nothing of the discussion as to
19 submission of his case on the transcript of the preliminary
20 hearing (a matter which will be dealt with further below). He
21 understood nothing of the possible defenses available, especial-
22 ly insanity, and thus failed to offer proof of or even to assert
23 such a defense.

24 There was no intelligent acquiescence or partici-
25 pation by petitioner in anything that was done during the course
26 of his trial. He had no knowledge and no understanding and the

1 and the trial judge gave him no help.

2 In Carnley v. Cochran (1961) 369 U.S. 506, 82 S.Ct.
3 884, the Supreme Court in a habeas corpus proceeding reversed
4 conviction on the following facts: An illiterate man was tried
5 in a Florida court, without counsel, and was convicted of child
6 molesting. The record was silent as to waiver of counsel but
7 clearly showed that he was incapable of conducting his own
8 defense. While petitioner was advised that he need not testify,
9 he was not told what consequences might follow if he did testify.
10 He chose to testify, and, as here, his criminal record was
11 brought out on his cross-examination, illustrating the need for
12 counsel. There, as here, the accused made no objection to
13 questions asked of him or of other witnesses; there, as here,
14 the accused was unable to conduct any cross-examination worthy
15 of the name.

16 That case is in these and other respects very
17 similar to the instant case in that the need for counsel was
18 clear. And here, unlike Carnley, petitioner was not advised
19 by the trial judge of his right to remain silent and of the
20 possible consequences if he testified.

21 Also of interest is Patton v. State of North
22 Carolina (CA 4, 1963) 315 F. 2d 643, a habeas corpus proceeding.
23 The accused, like this petitioner, was dissatisfied with his
24 attorney and refused to be represented by him. The trial court,
25 after giving the accused another opportunity to find an attorney,
26 proceeded to trial without defense counsel. The court, in

1 reversing and remanding, said:

2 ". . . even where the defendant purports
3 to waive right to counsel and even though
4 disclaimer of desire for counsel is ex-
5 pressly and unequivocally made, if the
6 defendant shows that such disclaimer was
7 not made intelligently and understandingly,
8 or that it was made as the result of any
9 coercion, such disclaimer will not be
10 given effect as a waiver of the constitu-
11 tional right to counsel."

12 The proper standard for discharge of the court's
13 "protecting duty" is illustrated by People v. Shields (1965)
14 232 C.A. (2d) 716, where, as here, a serious conflict arose
15 between the public defender and the accused. In Shields,
16 however, unlike the instant case, the trial judge explored with
17 the defendant, on the record, the differences between him and
18 the public defender, the possibility of retaining other counsel,
19 and the defendant's understanding of trial procedure, and there
20 found and stated on the record, "Apparently you don't know how
21 to handle a case." The trial judge refused, therefore, to
22 relieve the public defender of his duties as the accused's
23 counsel. The Appellate Court held there was no abuse of the
24 court's discretion, stating (at pages 722-723):

25 "It is apparent from defendant's general
26 demeanor and his response to the court's
questions that he could not make a competent,
intelligent and complete waiver of his right
to counsel, and that he was not competent to
represent himself at the trial.

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"If the court does not believe that an
indigent defendant is entitled to a change
of attorneys, he must proceed with the

1 attorney assigned to him or waive his
2 right to counsel and represent himself.
3 Even the alternative is subject to court
4 supervision, and before permission to do
5 so is granted, the court is duty bound to
6 determine whether the defendant is making
7 an intelligent and competent waiver."

8 Here, the trial transcript establishes that the
9 trial court made no determination of "intelligent and competent
10 waiver" and that none was possible because, as in Shields, the
11 accused did not "know how to handle a case."

12 2. Appellee's Involuntary Post-Arrest
13 Admissions Cannot Be Used Against Him.

14 Appellee was interrogated twice while in police
15 custody, within a short time following his arrest. Just pre-
16 ceding questioning, he had been apprehended by police while he
17 was in a frenzied and irrational state. The officers stated
18 that he was "cursing and screaming." The testimony shows that
19 he had just drunk almost three bottles of wine, which combined
20 with pills taken to control intense head pains to produce a
21 state characterized as a "blackout"; that he had had a number of
22 episodes of this nature which affected him as if there was a
23 "ball of red hot iron" in the back of his head, due partly to a
24 prior injury; that he was accused of committing acts of violence,
25 with no motive or apparent reason for the acts discernible from
26 the record; that he had never before committed an act of violence;
that according to police testimony his state was such that,
without capacity to assess the consequences, he stated that he
"would like to have gotten one of them too;" and that his mind

1 had been a "blank" from the time he left his hotel room until
2 he found himself in police custody. There was also testimony
3 that extreme force had been used against him by the police
4 officers. Yet, obvious as his condition was from the record,
5 these incriminating statements were used against him at the
6 preliminary hearing and at the trial.

7 Admissions elicited in a proceeding that is
8 accusatory in nature and is for the purpose of obtaining in-
9 criminating statements, are involuntary in the legal sense and
10 therefore inadmissible, where made at a time when the person
11 lacked the mental capacity to understand the meaning, effect
12 and intention of his words, when the responses were not freely
13 and voluntarily given, or when he was mentally deranged to the
14 extent that he was unable to distinguish between right and
15 wrong.

16 Miranda v. Arizona (1966) 384 U.S. 436,
86 S. Ct. 1602;
17 Townsend v. Sain (1962) 372 U.S. 293,
83 S. Ct. 745;
18 Fikes v. Alabama (1957) 352 U.S. 191, 196,
85 S. Ct. 828;
19 People v. Farrington (1903) 140 Cal. 656;
20 People v. McCagnan (1954) 129 Cal. App.
(2d) 100, 276 P.2d 679;
21 People v. Aguilar (1934) 140 Cal. App. 87,
35 P.2d 137, 142.

22 The substantive tests of voluntariness have become
23 increasingly meticulous through the years.

24 Johnson v. New Jersey (1966) 384 U.S.
719, 86 S. Ct. 1772;
25 Reck v. Pate (1961) 367 U.S. 433, 81
26 S. Ct. 1541.

1 It is now axiomatic that the petitioner's rights
2 were violated if his conviction is based, in whole or in part,
3 on an involuntary confession, regardless of its truth or
4 falsity.

5 Rogers v. Richmond (1961) 365 U.S. 534,
6 544, 81 S. Ct. 735.

7 This is so even if there is ample evidence aside
8 from the confession to support the conviction.

9 Malinski v. N.Y. (1945) 324 U.S. 401,
10 404, 65 S. Ct. 781

11 This rule applies to State as well as Federal
12 courts.

13 Malloy v. Hogan (1964) 378 U.S. 1,
14 84 S. Ct. 1489.

15 Voluntariness is not conclusively established by a
16 showing that petitioner's words were coherent.

17 Townsend v. Sain, supra, 372 U.S. at 320.

18 In petitioner's case we are not dealing with mere
19 intoxication, such that his words might be admitted into evidence
20 for their weight and credibility. As pointed out, the alcohol,
21 head pain due to a pre-existing injury, and pain pills affected
22 his mind to the point of "blackout," of complete irrationality.
23 The alleged admissions were also elicited, as is conceded by
24 both officers testifying at the trial, in response to questioning
25 of an accusatory nature, while petitioner was in police custody
26 and with no showing that he had been advised of his right to

1 counsel or of his absolute right to remain silent. The adversary
2 system of criminal proceedings commences when the accused is
3 first subjected to police interrogation.

4 Miranda v. Arizona, supra.

5 The fact that the petitioner was not advised of
6 his right to remain silent or of his right respecting counsel
7 at the outset of the interrogation is a significant factor in
8 considering the voluntariness of the statements later made, and
9 gives added weight to the other circumstances which made his
10 admissions involuntary.

11 Davis v. North Carolina (1966) 384 U.S.
12 737, 86 S. Ct. 1761;

13 Maynes v. Washington (1962) 373 U.S.
14 503, 510-11, 83 S. Ct. 1336;

15 Spano v. N. Y. (1959) 360 U.S. 315,
16 79 S. Ct. 1202.

17 Petitioner at the time of his questioning had no
18 counsel to protect him from mindless and incriminating ad-
19 missions; nor did he have counsel at the trial to assess the
20 quality and admissibility of these responses and to make proper
21 objections to their introduction. There was no opportunity at
22 the trial level to litigate the issue of voluntariness of the
23 admissions, since, as pointed out above, petitioner was not
24 aware of the procedural safeguards available to him.

25 The Supreme Court in Jackson v. Denno (1964) 378
26 U.S. 368, 84 S. Ct. 1447, has held that the inadmissibility of
involuntary confessions is to be given retroactive effect and a

1 conviction is subject to collateral attack in cases final before
2 that case was decided, because the persuasiveness and yet the
3 untrustworthiness of such evidence "affect the very integrity
4 of the fact-finding process."

5 See also:

6 Linkletter v. Walker (1965) 381 U.S.
7 618, 85 S. Ct. 1731.
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16 CONCLUSION

17 Numerous errors were committed at the trial which
18 could not have been committed had appellee been represented by
19 counsel. These errors include the admission of the transcript
20 of the preliminary examination, improper questioning by the
21 trial judge as to prior criminal charges which elicited a
22 prejudicial response, and the failure of the prosecution to
23 produce the key witness against petitioner, and this in the face
24 of petitioner's explicit request for his production.

25 The fact that petitioner had no trial counsel made
26 impossible, under the circumstances, an effective or even an

1 adequate defense covering all possible defenses and protecting
2 all established rights.

3 The trial judge failed to advise petitioner of
4 his right not to testify and all the possible dangers inherent
5 in his testifying, and petitioner's testimony was in many
6 respects harmful to his defense.

7 Petitioner's admissions elicited at his post-
8 arrest questioning, while in a state of virtual unconsciousness
9 induced by alcohol, pills, intense pain, and frenzied emotion,
10 were admitted in evidence against him during the preliminary
11 examination and at the trial.

12 The trial judge throughout made no effort to
13 assist petitioner or to advise him on vital procedural rights
14 which a layman could not have been expected to know.

15 Under all of these circumstances, the evidence is
16 unreliable and the judgment of conviction based thereon is in
17 grave doubt.

18 Linkletter v. Walker (1965) 381 U.S.
618, 85 S. Ct. 1731;

19 Carnley v. Cochran (1961) 369 U.S.
506, 82 S. Ct. 884;

20 Betts v. Brady (1942) 316 U.S. 455,
62 S. Ct. 1252;

21 Powell v. Alabama (1932) 287 U.S.
45, 53 S. Ct. 55;

22 Gideon v. Wainwright (1963) 372 U.S. 335.

23 When examined by current State and Federal constitutional
24 standards, nothing remains of the evidence against petitioner.

25 It cannot be said that no miscarriage of justice
26 resulted from any of the errors committed during petitioner's

1 trial. All of such errors and each of them were harmful.

2 Chapman v. California, supra;

3 People v. Burness (1942) 53 Cal. App.
4 (2d) 214;

5 California Constitution Art. VI, §4-1/2.

6 For the foregoing reasons, the judgment below
7 should be affirmed.

8 Dated: AUG 13 1968

9 Respectfully submitted,

10 TREUHART, WALKER & BURNSTEIN

11 By _____
12 Doris Brin Walker

13 _____
14 Ralph Johansen
15 Attorneys for Appellee
16
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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WILLIAM J. BOWIE,)

Petitioner,)

vs.)

LAWRENCE E. WILSON, WARDEN,
California State Prison,
San Quentin, California,)

Respondent.)

No. 43441

ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, William J. Bowie, presently incarcerated at San Quentin Prison, brings this petition for a writ of habeas corpus. On February 10, 1961, he was convicted of assault with a deadly weapon. This court denied a petition for a writ of habeas corpus on January 18, 1966. That order was vacated on February 15, 1967, by the Court of Appeals, and petitioner was given an opportunity to exhaust available state remedies. That he has done, and the petition is now again before this court.

CONFRONTATION OF WITNESSES.

At petitioner's trial, the prosecution offered into evidence the transcript of the preliminary hearing. The testimony of Peter Coletsos, the putative victim of one of petitioner's alleged assaults, was, if not vital, important to the prosecution's case. H. did not appear at trial.

Petitioner submits that he was denied his sixth amendment right to confront and cross-examine the witness at the trial. It is not disputed that petitioner was represented by counsel at the preliminary hearing and that Mr. Coletsos was there cross-examined. Counsel, at the preliminary hearing, was not ineffective. The sole question for decision, then, is whether the prior recorded testimony was properly admitted, given the showing made concerning the witness' availability for trial.

The answer is no.

The defendant's right to confront and cross-examine witnesses against him is an important one, guaranteed by the sixth and fourteenth amendments. Pointer v. Texas, 380 U.S. 400, 403-404 (1964). Whether or not cross-examination is the greatest engine of truth ever devised, it is one important method of fact-finding. The defendant's right thereto must not be dismissed lightly.

The reasonable and orderly administration of criminal justice, however, does necessitate that there be some instances when a person may not be required to be in attendance as a prerequisite to the admission of evidence. Pointer,

supra at 407, cites the example of a dead declarant. Pointer was a case of a declarant beyond the reach of the forum state.

At the trial of William Bowie, virtually no showing of unavailability was made. The prosecution attempted to subpoena the witness and he did not appear (RT 44). That showing alone is constitutionally inadequate.

The court is aware that petitioner, through counsel, did cross-examine the witness at the preliminary hearing. That fact does not excuse the state from producing the witness at trial if it can. Observation of a witness' demeanor during direct and cross-examination is the way of judging

1 credibility and of sorting out conflicting evidence. To
2 fail to produce an available witness jeopardizes the very
3 integrity of the fact-finding process, even where prior
4 cross-examination has been had. Failure to produce an
5 available witness also runs counter to the constitutional
6 abhorrence of secret proceedings and witnesses.
7

8 No showing was made that the court could not, after a
9 brief continuance, procure the attendance of the witness.
10 A continuance would not have burdened the court, for no jury
11 was involved. No inquiry was made whether the witness could
12 be produced. The record attests to the fact that there was
13 not any showing of the due diligence of the prosecutor in
14 attempting to find the witness. The judge made no inquiry
15 concerning the witness' availability. Rather, the following
16 proceeding took place without a hesitation:

17 MR. FLOYD: We attempted to subpoena Mr.
18 Coletsos, your Honor. He's not in Court this
morning.

19 THE COURT: You want to testify, don't you?

20 THE DEFENDANT: I do, your Honor.

21 THE COURT: All right.

22 [Petitioner was then sworn and began
23 testifying.]

(AT 44-45)

24 Prior recorded testimony may be admitted, with no oppor-
25 tunity for present cross-examination, only where there has
26 been prior confrontation and where the witness is presently
27 unavailable. Cf., Pointer, supra; Jones v. California, 364
28 F. 2d 522 (9th Cir. 1966). The court need not now decide
29 what facts constitute unavailability sufficient to admit
30 prior recorded testimony. The court does now decide that
31 the showing in this case was insufficient.

32 Respondent contends that petitioner, who was not repre-
sented by counsel at trial, waived any right to cross-examine

1 the witness by submitting the matter on the transcript and
2 by not objecting to its being admitted into evidence. This
3 court, after carefully reviewing the record, finds respondent's
4 argument without merit.

5
6 The waiver of the right to cross-examine a witness must
7 be voluntary, intelligent, and personal. Brookhart v. Janis,
8 384 U.S. 1 (1966). The record does not support any argument
9 of waiver. For example:

10 MR. MAURER: Would you want to submit the
11 matter on the transcript?

12 MR. DRESOW [a public defender present, but
13 not representing petitioner]: Oh, don't take
14 advantage of him that way. He doesn't understand
15 that. . . .

16 THE COURT: Why don't you, why don't you let
17 the Public Defender --

18 MR. DRESOW: We don't want him, Judge, but I
19 don't want him taken advantage of.

(RT 1-2)

20 And the following week:

21 THE CLERK: The matter of William Bowie,
22 for decision.

23 He had waived a jury trial and submitted it
24 on the transcript.

25 THE DEFENDANT: Yes.

26

27 THE COURT: . . .

28 You want a hearing now, is that right?

29 THE DEFENDANT: Yes.

(RT 6)

30 THE COURT: Did you submit the case on the
31 transcript? Did you intend that I read this tran-
32 script and make a decision from that, or did you
33 want to testify?

34 THE DEFENDANT: Your Honor, I want the wit-
35 nesses present, with the Court's approval, to
36 question them, to have the privilege of cross-examin-
37 ing them, and let the Court decide the matter after
38 that.

39 THE COURT: Very well.

(RT 31)

1 The transcript was improperly admitted into evidence in
2 derogation of petitioner's sixth amendment right. Because
3 of the damaging nature of the testimony, this court cannot
4 say that the error was harmless. Quite the contrary is true --
5 it was prejudicial and harmful.

6
7 RIGHT TO BE WARNED OF RIGHT
8 NOT TO TAKE THE STAND.

9 Petitioner was not represented by counsel at trial. He
10 took the stand and testimony in the nature of impeachment was
11 elicited (RT 47-48). Petitioner argues that an unrepresented
12 defendant in a state criminal prosecution must be warned by
13 the judge of his constitutional right not to take the stand
14 and of the consequences that might follow should the defendant
15 elect to do so.

16 There is a dearth of decisional law on point, probably
17 because the period during which warnings of constitutional
18 rights have been required has coincided with an expanding
19 right to counsel. In any event, this court holds that a
20 trial judge must explain, to an unrepresented defendant, his
21 right not to take the stand. An unknown right might just as
22 well be no right at all. As in Miranda v. Arizona, 384 U.S.
23 436 (1966), where the inherently coercive nature of station-
24 house interrogation necessitates warnings of fifth amendment
25 rights, and the appointment of counsel to effectuate them,
26 a trial can be similarly inherently coercive. If a defendant
27 is not warned of his right and of the consequences of taking
28 the stand, he might feel compelled to testify -- " 'to tell
29 my side of the story' . . . oblivious to the procedural con-
30 sequences of such a step." Comment, Criminal Waiver, The
31 Requirements of Personal Participation, Competence and Legiti-
32 mate State Interest, 54 Calif. L. Rev. 1262, 1270, 1293 n.
215 (1966).

This court is satisfied that the federal constitution required a warning and explanation of consequences. The failure to give them was error. The court further finds that the error was not harmless beyond a reasonable doubt or non-prejudicial.

The court observes that since Bowle's trial, California courts have settled the issue, at least as a matter of state law -- the warning must be given. People v. Glasser, 238 Cal. App. 2d 819 (1965); People v. Kramer, 227 Cal. App. 2d 199 (1964). Neither California case squarely rests on the federal constitutional ground or on the efficient-administration-of-state-criminal-justice argument.

Federal courts have decided similar cases. E.g., United States v. Luremberg, 374 F. 2d 241 (6th Cir. 1967) (defendant, testifying before grand jury, must be advised of fifth amendment rights); Cliett v. Hammonds, 305 F. 2d 565, 570 (5th Cir. 1962) (error not to give warning of privilege against self-incrimination); Kershner v. Boles, 217 F. Supp. 9 (N.D. W. Va. 1963) (state defendant who was asked about prior convictions which could aggravate sentence must be warned as to effect of answer and of right to remain silent).

WAIVER OF RIGHT TO COUNSEL;
VOLUNTARINESS OF CONFESSION.

The record presents a close question concerning the waiver of petitioner's right to counsel. Defendant may have known exactly what he was doing and may have not desired association with the public defender's office. Alternatively, he may have expected some limited assistance, cooperation or coordination with the public defender's office. However, in view of the court's rulings above, the question need not be decided, for should the state re-try defendant, at that time the defendant-petitioner may choose to waive counsel or he

1 may not. The state court will determine the facts at that
2 time. What happened at the last trial will be irrelevant.
3

4 A similar observation is appropriate concerning the
5 voluntariness of petitioner's confession. At a new trial,
6 the state court will be able to determine for itself whether
7 the confession is admissible. The present record alone may
8 indicate that it is, but on retrial petitioner may be able
9 to present additional facts indicating otherwise.

10 ORDER.

11 IT IS ORDERED that a writ of habeas corpus be issued
12 and that petitioner be released from the custody of the
13 respondent.

14 Execution of this order is stayed for twenty (20) days
15 pending the filing of a notice of appeal by respondent, who
16 may apply for a further stay in the event the appeal is
17 filed.

18 Dated: November 1, 1967
19

20 ALFONSO J. ZIRPOLI
21 United States District Judge
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MANUEL LEYVA LOPEZ,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

FILED

AUG 1 1968

WM. B. LUCK, CLERK

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MANUEL LEYVA LOPEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

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APPELLEE'S BRIEF

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MANUEL LEYVA LOPEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant, MANUEL LEYVA LOPEZ (hereinafter referred to as Lopez), was indicted, together with Ernest Garcia De La Rosa, by the Federal Grand Jury for the Central District of California on April 12, 1967 [C. T. 2-4]. ^{1/} The indictment, in three counts, charged De La Rosa and Lopez with possession, sale and unlawful transfer of 10.180 grams of heroin.

^{1/} "C. T. " refers to Clerk's Transcript, filed July 24, 1967.

Lopez and De La Rosa were arraigned on April 17, 1967 before the Honorable E. Avery Crary, United States District Judge; at this time Lopez was represented by Solomon Kleinman, appointed counsel [C. T. 6]. Lopez and De La Rosa entered a plea of not guilty to all counts of the indictment and the case was transferred to the Honorable Charles H. Carr for trial setting. On April 17, 1967, Lopez and De La Rosa appeared before Judge Carr at which time trial was set for Tuesday, May 9, 1967 [C. T. 7].

On May 9, 1967, Lopez and De La Rosa again appeared with counsel before the Honorable Charles H. Carr [C. T. 35]. On this date a jury was selected and trial commenced. On May 10, 1967, both Lopez and his co-defendant were found guilty on all three counts [C. T. 41].

On September 25, 1967, Lopez was sentenced to the custody of the Attorney General for a period of seven years on each of Counts One, Two and Three, said sentences to run concurrently with each other [C. T. 9]. 2/

Notice of Appeal was filed September 25, 1967 [C. T. 10].

Jurisdiction of the District Court was based on Title 21, United States Code, Section 174, Title 26, United States Code, Section 4705(a), Title 18, United States Code, Section 3231 and Rule 18, Federal Rules of Criminal Procedure. This Court has jurisdiction to review the judgment of the District Court pursuant

2/ C. T. refers to Clerk's Transcript filed May 6, 1968.

to Title 28, United States Code, Sections 1291 and 1294 and Rule 37(a) of the Federal Rules of Criminal Procedure.

II

STATEMENT OF FACTS

Count Two of the indictment charges Lopez and his co-defendant with possession of 10.180 grams of heroin in Los Angeles County on December 27, 1966. Counts One and Three charged the sale and unlawful transfer, respectively, of this same heroin to Agent Frank Figueroa of the Federal Bureau of Narcotics on or about December 27, 1966, in Los Angeles County. The Government's case was based mainly on the testimony of the chemist, Julian Grooms [R. T. 32-41], ^{3/} who testified that he analyzed the powder purchased by Agent Figueroa and concluded that it was heroin, and on the testimony of Agent Figueroa of the Federal Bureau of Narcotics, who testified concerning negotiations and the actual transfer of 10.180 grams of heroin from Lopez and De La Rosa to himself [R. T. 54-72].

Agent Figueroa testified that on December 27, 1966, he was at the Federal Bureau of Narcotics office with Alfonso Masias, the informant in the case [R. T. 56], who was deceased at the time of the trial [R. T. 75/12-13]. The informant placed a telephone call to Lopez which was monitored by Agent Figueroa with

^{3/} "R. T. " refers to Reporter's Transcript.

the consent of the informant [R. T. 56/16-17; 76/6-9]. This was done by means of a non-magnetic, non-electronic extension device that was attached to the phone receiver [R. T. 57/25; 58/1-6; 108/14-25; 109/1-8]. Agent Figueroa's testimony in this regard was objected to by Mr. Kleinman, counsel for Lopez, on the ground of hearsay and "tapping the telephone call" [R. T. 57/2-3; 58/20-25]. This objection was overruled by the court [R. T. 59/1-3]. At the close of the Government's case Mr. Kleinman moved for a judgment of acquittal on the grounds that Agent Figueroa's testimony in this connection was not competent evidence [R. T. 127/21 - 128/21]. The motion was denied [R. T. 129/25 - 130/1]. It is to be noted that no pre-trial motion to suppress under Rule 41(e), Federal Rules of Criminal Procedure, was filed in this connection.

Agent Figueroa, continuing his testimony, stated that during the conversation between the informant and Lopez, he overheard the informant arrange with Lopez for the purchase of "two quarters" of heroin, at a price of \$50 a quarter [R. T. 59/19 - 60/7]. Following this conversation the informant and Agent Figueroa drove to the residence of Lopez. Here they found Lopez and his co-defendant De La Rosa. After making a telephone call, Lopez directed that the four of them drive to Whittier Boulevard and Burger Streets in East Los Angeles where they would receive the heroin. Upon arriving at the above location, De La Rosa received \$100 from Agent Figueroa and went into a nearby alley. In a few minutes he returned and the four of them drove back to

the residence of Lopez. They all re-entered this house and Agent Figueroa was given the package containing heroin by De La Rosa after Lopez had looked at it to see if it was the correct weight.

III

QUESTION PRESENTED

DID THE TRIAL COURT COMMIT ERROR IN ADMITTING INTO EVIDENCE THE TESTIMONY OF AGENT FIGUEROA RELATING TO THE TELEPHONE CONVERSATION HE OVERHEARD BETWEEN THE INFORMANT AND THE DEFENDANT LOPEZ?

IV

ARGUMENT

THERE IS NO FOURTH AMENDMENT VIOLATION WHERE EVIDENCE IS SECURED BY MEANS OF A MECHANICAL LISTENING DEVICE WHERE IT APPEARS THAT ONE OF THE PARTIES TO THE CONVERSATION CONSENTED TO ITS BEING OVERHEARD.

Lopez concedes that the consent of the informant to overhear their conversation removes it from the operation of Section 605 of the Federal Communications Act.^{4/} (Appellant's Brief

^{4/} 47 U. S. C. Section 605.

9/5-6). Indeed there can be no question that the contents of a communication overheard by a police officer on a telephone extension with the consent of a party to the conversation, are admissible in federal court.

Rathbun v. United States, 355 U. S. 107 (1957).

Although the conversation in Rathbun was overheard by means of an extension telephone and not a listening device as used in the instant case, the principle of that case clearly applies to the case at bar. In holding on the facts of the case that there was no "interception" of a telephone message, as Congress intended the work to be used in Section 605 of the Federal Communications Act, the court quoted from the statute as follows:

"No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto. "

The court went on to say that,

"[t]he clear inference is that one entitled to receive the communication may use it for his own benefit or have another use it for him. The communication itself is not privileged, and one party may not force the other to secrecy merely by using a telephone. "

Rathbun v. United States, supra, at p. 110.

The Rathbun rationale has been followed in previous Ninth Circuit decisions.

Lindsey v. United States, 332 F.2d 688, 691
(9th Cir. 1964);

McClure v. United States, 332 F.2d 19
(9th Cir. 1964);

Wilson v. United States, 316 F.2d 212
(9th Cir. 1963);

Carbo v. United States, 314 F.2d 718
(9th Cir. 1963).

Thus, the only issue to be considered in this appeal is whether the actions of Agent Figueroa in overhearing the conversation between Lopez and the Informant constituted an unreasonable search and seizure within the context of the Fourth Amendment. In Katz v. United States, 19 L. Ed.2d 516 (1967), the Supreme Court extended the protection of the Fourth Amendment to cover the situation where a telephone conversation was overheard by means of an electronic listening and recording device which had been attached by agents of the Federal Bureau of Investigation to the outside of the public telephone booth from which the defendant had placed his call. The court established the principle that the Fourth Amendment protects people, not places, and since it had previously held in Silverman v. United States, 365 U.S. 505 (1961) that the interception of a conversation reasonably intended to be private could constitute a search and

seizure, it concluded that the absence of a physical penetration into the telephone booth was not critical.

However, the facts in Katz are clearly distinguishable from those in the instant case. Here, one party to the conversation consented to a federal narcotics agent listening in on the conversation, which was effected by means of a non-magnetic, non-electronic attachment to the receiver being used by the informant. Although such activity constituted a betrayal of the defendant's confidence, he did intend the informer to hear what he was told. The fact that the informer breached the confidence the defendant reposed in him by permitting Agent Figueroa to overhear the conversation does not violate any constitutional right of the defendant.

Justice White's comments in his concurring opinion in Katz appear to echo these sentiments:

"When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law abiding) associates. . . . It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another."

Katz v. United States, supra, at p. 589.

It is important to note that Justice White in his concurring opinion points to the following cases, decided by the Court previous to Katz and where no Fourth Amendment violations were found, as being left undisturbed by that decision:

1. Evidence obtained by an undercover police agent to whom a defendant speaks without knowledge that he is in the employ of the police. Hoffa v. United States, 385 U.S. 293 (1966).

2. Evidence obtained by a recording device hidden on the person of such an informant. Lopez v. United States, 373 U.S. 427 (1963); Osborn v. United States, 385 U.S. 323 (1966).

3. Evidence obtained by a policeman listening to the secret micro-wave transmissions of an agent conversing with the defendant in another location. On Lee v. United States, 343 U.S. 747 (1952).

Consideration should be given to the fact that in all of the foregoing cases, a face to face confrontation between the defendant and the agent was involved, while in the present case the defendant and the informant were conversing by telephone. Since extension telephones are commonplace, Lopez had much less reason to feel secure in his conversation with the informant than did the defendants in the cited cases.

At least one Circuit since the Katz case was decided has distinguished Katz on the basis discussed above.

Dryden v. United States, 5th Cir.,

March 22, 1968, No. 25368.

In Dryden, the appellant urged that it was error to admit

into evidence a tape recording of a telephone conversation between himself and the Government informer, where the recording was made with the permission of the informer. In affirming the conviction, the court pointed out that in Katz, the Supreme Court was careful to state that " 'What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection' ".

By implication the quoted statement points up the risk inherent in any form of communication between two parties, viz., the risk of betrayal of the contents of the conversation by one of the parties. As Bradley and Hogan, in "Wiretapping: From Nardone to Benanti and Rathbun", 46 Georgetown Law Journal 418, 440 put it:

"If the recipient of the information is free to betray the confidence of the other party, what difference should the form of betrayal make? If he can repeat what he hears, if he can make notes of what he is told, if he can make a record of the conversation, is it not logical that he ought to be allowed to let a third person do these things for him?"

This Circuit has previously taken the position that listening in on a telephone conversation on an extension phone with the consent of one party does not constitute a search prohibited by the Fourth Amendment.

Olney v. United States, 380 F.2d 28

(9th Cir. 1967);

See also Todisco v. United States, 298 F.2d 208

(1961), finding no violation of the defendant's constitutional rights where the conversation between the agent and the defendant was broadcast by means of a miniature radio transmitter concealed on the agent's person without the defendant's knowledge.

The Tenth Circuit has also adopted the foregoing rationale.

In Rogers v. United States, 369 F.2d 944 (10th Cir. 1966), certain tape recordings of telephone conversations were admitted into evidence over the defendant's objection. In affirming the conviction, the court stated:

"The recording of a telephone conversation made by placing an induction coil on a previously placed and regularly used extension telephone, all of which is done with the knowledge, consent and permission of the party using the other extension, does not violate the Fourth or Fifth Amendment, nor is it prohibited by the Federal Communications Act."

Rogers v. United States, supra, at p. 946.

In Hoffa v. United States, supra, decided previous to Katz,

but left untouched by that decision, the Supreme Court found no Fourth Amendment violation on facts which differ from those in the instant case. The philosophy of that case however is plainly

applicable here. In that case, the defendant made incriminating statements to a Government agent in his hotel suite. The court stressed that the Fourth Amendment does not protect a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal the wrongdoing. Hoffa v. United States, supra, at pp. 302, 303. This type of a situation, it is contended, as well as that involved in the instant case, is left undisturbed by Katz. Clearly, Katz did not hold that overhearing a telephone conversation, where one party consents thereto, is an unreasonable search and seizure. Obviously, the main thrust of the newly adopted policy in Katz of protecting people, not places, is aimed at those instances where a conversation is listened to, no matter how or where it is effected, without the knowledge or consent of either party to the conversation, and where no warrant was obtained. This was the situation decried in Katz, but, as explained above, is not the situation presented here.

V

CONCLUSION

For the foregoing reasons it is requested that the decision of the trial court be affirmed.

Respectfully submitted,

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No. 22,572 and 22,572A

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22,572

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

RAYTHEON COMPANY, *Respondent*

No. 22,572A

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND
MACHINE WORKERS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

AND

RAYTHEON COMPANY, *Intervenor*

**On Petition for Enforcement and on Petition to
Review an Order of the National Labor
Relations Board**

BRIEF FOR RAYTHEON COMPANY

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FILED

SEP 30 1968

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No. 22,572 and 22,572A

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22,572

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

RAYTHEON COMPANY, *Respondent*

No. 22,572A

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND
MACHINE WORKERS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

AND

RAYTHEON COMPANY, *Intervenor*

STATEMENT OF THE CASE

Preliminary Statement

I. Basis for this Court's Jurisdiction.

These cases, consolidated by order of the Court, arise from an unfair labor practice proceeding initiated before the National Labor Relations Board¹ by the International Union of Electrical, Radio and Machine Workers, AFL-CIO² against Raytheon Company³. Case No. 22,572 is the Board's petition for enforcement of its order en-

¹ Referred to herein as the "Board".

² Referred to herein as the "IUE".

³ Referred to herein as "Raytheon".

tered against Raytheon in said unfair labor practice proceeding. Case No. 22,572A is the IUE's petition for review of that portion of the Board's order which refused to grant a motion made at the hearing by the IUE to amend the complaint to allege further unfair labor practices. This Court has jurisdiction of the cases under Sections 10(e) and 10(f) of the National Labor Relations Act⁴, as amended, respectively, the conduct in question having occurred in California.

2. The Board's Petition for Enforcement.

This brief on behalf of Raytheon will be directed primarily to the Board's petition for enforcement of its order. Said order is based upon findings and recommendations of the Trial Examiner, adopted by the Board, to the effect that certain portions of a speech given by Raytheon's Vice-President Robert G. Hennemuth to eight separate groups of production and maintenance employees at Raytheon's Mountain View, California plant prior to a representation election conducted by the Board⁵ and certain statements made by one of Raytheon's first level foremen (Nicola Krest) to one (Carolyn Alvarado) of the 557 employees eligible to vote constituted violations of Section 8(a)(1) of the Act.

In view of the Trial Examiner's findings that Krest's remarks to Alvarado "took on added emphasis and significance" from the Hennemuth speeches (R. 20, lines 28-31)⁶ and that Raytheon's violation of Section 8(a)(1) was in "major part" through said speeches, (R. 23, line 37), the question as to whether the speeches were lawful

⁴ Referred to herein as the "Act".

⁵ Referred to herein as "the Hennemuth speeches".

⁶ References herein to the pleadings filed with the Court as Volume I, Pleadings will be designated "R.". References to the stenographic transcript of the Hearing before the Trial Examiner filed with the Court as Volumes II and III, will be designated "Tr.". References to Exhibits of the General Counsel, Petitioner (IUE), and Respondent will be designated G.C. Exh., Pet. Exh., and Resp. Exh. respectively.

is of primary importance in determining whether the Board's order is entitled to enforcement.

In this brief Raytheon will set forth argument and precedent in support of its position as follows:

1) The Hennemuth speeches were a moderate and reasoned presentation of facts the employees were entitled to consider prior to the election and were a proper exercise of the right of free speech guaranteed by Section 8(c) of the Act and the First Amendment to the U. S. Constitution; and

2) With respect to the Krest-Alvarado incident, no proper credibility findings were made to resolve the conflict in testimony between Krest and Alvarado; even if the testimony of Alvarado is accepted as correct, Krest's alleged statements were lawful and protected by Section 8(c) and the First Amendment; and, in any event, the incident does not reflect a general plan of coercion by Raytheon, and is *de minimis*.

3. The IUE's Petition for Review.

With respect to the IUE's petition for review, it is the position of Raytheon that the Board properly refused the request to amend the complaint at the hearing. As all parties to unfair labor practice proceedings before the Board are fully aware, evidence as to specific violations must first be presented to the General Counsel who, acting in this instance through the Regional Director, determines whether the evidence warrants issuance of a complaint.

Here the complaint as issued was limited to certain specified allegations. It was improper for the IUE to attempt at the hearing to introduce evidence with respect to allegations not specifically set forth in the complaint; it can be presumed that the Regional Director had concluded that there was insufficient evidence to warrant a hearing with respect to said allegations. Since this issue directly relates to the functions of the Board under the

Act and has been thoroughly argued by the Board in its brief, Raytheon will not present additional argument on the issue in this brief.

STATEMENT OF FACTS

Raytheon is an electronics manufacturer with plants located in several states (Tr. p. 236). As of the date of the hearing Raytheon employees in Massachusetts, Connecticut, Rhode Island, and Oxnard and South San Francisco, California were represented by unions and there had never been a strike by Raytheon employees (Tr. p. 236). Approximately nineteen petitions for elections have been filed at Raytheon plants during the period 1960-1966 and prior to the instant case no objections had been filed to Raytheon's pre-election conduct. (Tr. pp. 237-238).

On January 4, 1965, the IUE filed a petition with the Board for a representation election to be held in a unit of production and maintenance employees at Raytheon's Mountain View, California plant. Subsequently the IBEW expressed an interest in the proceeding and the February 4 election date was agreed upon by the parties. The final tally of votes was: Neither Union 301, IUE 161, IBEW 54. (R. 19, lines 31-36).

On February 11, 1965, the IUE filed objections to Raytheon's pre-election conduct, and on April 5, 1965, filed the unfair labor practice charge which is the subject of this proceeding. (R. 19, lines 36-38). The objections to the election and the unfair labor practice proceeding were consolidated by order of the Regional Director and a hearing was held on January 19 and 20, 1966, in San Francisco before Trial Examiner William E. Spencer. (R. 12, 18).

On June 13, 1966, the Trial Examiner issued a decision in which he recommended that the election be set aside and that Raytheon be found to have violated Section 8(a)(1) on the basis of Hennemuth's speeches and the

statements made by Krest to Alvarado and be ordered to cease and desist from committing further unfair labor practices of a similar nature. (R. 18-27). In a Decision, Order and Direction of Second Election issued on October 5, 1965, the Board adopted the findings of the Trial Examiner, except that in a footnote comment, the Board found, contrary to the Trial Examiner that statements by Hennemuth that it was his job to investigate any complaints brought to his attention by any employee at any of Raytheon's facilities constituted the "announcement of a new grievance procedure" and consequently was a further violation of Section 8(a)(1). (R. 41-44).

Although the Board, on page 8 of its Brief, refers to the fact that "the Company relied heavily on an extensive anti-union propaganda campaign", the evidence submitted was several bulletins, two newspaper clippings relating to IUE strikes and the Hennemuth speeches. (G.C. Exh. 4-12). On the other hand, the IUE distributed approximately 20 to 25 leaflets during the six and a half month organizing drive and held regular meetings at a local motel. (Tr. p. 219, lines 9-11; p. 213, lines 14-20; p. 217, lines 11-15; Pet. Exh. 3).

Although in the Statement on pages 2-7 of its brief, the Board refers to three of the Raytheon bulletins, the complaint did not allege any violations based on said bulletins and the validity of the bulletins was not litigated before the Trial Examiner or the Board.

In commenting on the Hennemuth speeches, the Trial Examiner noted that they were given without rancor "and in an atmosphere which was undoubtedly calculated to and did in fact convey the appearance of friendly counsel." (R. 20, lines 38-44). Seven of the eight sessions of the speech were recorded by tape. (Tr. p. 244)⁷. In the second, third and fourth sessions, through inadver-

⁷ The session with a group of 15 to 17 deaf mutes was not recorded as it was very slow. (Tr. p. 244)

tence the recording machine was not turned on until several minutes had elapsed. (Tr. pp. 245-246). The Trial Examiner found that the testimony of the General Counsel's witnesses with respect to the content of the speeches was not markedly at variance with the tape recording. (R. 20, lines 52-54). One General Counsel witness testified that the speech she heard "was almost completely a letter that we received a day after the speech." (Tr. 93, lines 9-10; G.C. Exh. 11).

The Statement in the Board's brief sets forth only selected excerpts from the Hennemuth speeches. In the prepared portion of the speeches, Hennemuth introduced himself, summarized his background with Raytheon, and gave the employees the following four thoughts (G.C. Exh. 11):

1) *Importance of voting*—The voting procedure with emphasis on each employee's right to make his own decision by a secret ballot; if a majority of the employees actually voting selected a union then that union would represent the entire unit even though many employees may not have expressed their right to vote. (Speech 1—Resp. Exh. 3 pp. 2-4; Speech 2—not recorded; Speech 3—not recorded; Speech 4—not recorded; Speech 5—Resp. Exh. 7, pp. 2-3; Speech 6—Resp. Exh. 8, pp. 2-3; Speech 7—Resp. Exh. 9, pp. 2-3)

2) *Explanation of the collective bargaining process*—The necessity for agreement by both parties to any contract terms with emphasis on the fact that the union could not guarantee anything since a period of negotiations must follow and that if the Company did not agree to union demands, the union's only remedy is to strike. (Speech 1—Resp. Exh. 3, pp. 4-5; Speech 2, not recorded; Speech 3—Resp. Exh. 5, p. 1; Speech 4—Resp. Exh. 6, p. 1; Speech 5—Resp. Exh. 7, pp. 3-4; Speech 6—Resp. Exh. 8, pp. 3-6; Speech 7—Resp. Exh. 9, pp. 3-5).

3) *Comparison of wages and fringe benefits*—Review of existing wage rates, fringe benefits and working conditions, emphasizing that fringe benefits are uniform at Raytheon plants, union or non-union, and

that present wages, fringe benefits and working conditions at the Mountain View plant have been obtained without a union. (Speech 1—Resp. Exh. 3, pp. 5-8; Speech 2—Resp. Exh. 4, pp. 1-2; Speech 3—Resp. Exh. 5, pp. 1-4; Speech 4—Resp. Exh. 6, pp. 2-6; Speech 5—Resp. Exh. 7, pp. 5-8; Speech 6—Resp. Exh. 8, pp. 6-9; Speech 7—Resp. Exh. 9, pp. 5-8).

4) *Request for support*—Raytheon's expenditure of million of dollars on the Mountain View plant without receiving any profit; the pledge of continuing support by Raytheon; and the request for employee support. Speech 1—Resp. Exh. 3, pp. 8-9; Speech 2—Resp. Exh. 4, pp. 2-3; Speech 3—Resp. Exh. 5, pp. 4-5; Speech 4—Resp. Exh. 6, pp. 6-7; Speech 5—Resp. Exh. 7, pp. 8-9; Speech 6—Resp. Exh. 8, pp. 9-10; Speech 7—Resp. Exh. 7, pp. 8-9).

The vast majority of the statements made in the presentation of these thoughts and in the responses to questions from employees has not been challenged by the Board.

Throughout both the prepared portion of the speeches and his responses to the questions, Hennemuth repeatedly made comments such as the following which clearly advised the employees that the final decision was entirely up to them and that Raytheon could not and *would not* make threats or promises to influence that decision:

“And we recognize that this election, which is going to be held Thursday, is strictly your business but we do feel obligated as the management of the company to make sure that you have the facts that are involved as we see them and then you make your own choice and vote whichever way you please and I promise you on behalf of the company, first of all we won't know how you vote, but even if we did there will be absolutely no recrimination of any kind. This is a free election in the good old American tradition and we heartily approve of the whole idea. It is the best way I know of to settle any kind of a matter that is a public issue, if you will.” (Resp. Exh. 3, p. 1, lines 21-30).

“Look, let me say this to you folks. Rules or not, in this election so far as we're concerned in manage-

ment, we don't want to do ill to any of you people at any time and we don't want to be unfair or unreasonable. We respect your right to make whatever decision you're going to make on Thursday and all I can say to you really — and maybe this will answer your question — we are going to deal with our employees in good faith no matter whether a union is present or not. So our concern is with our employees and not with any union." (Resp. Exh. 5—p. 13, lines 12-19).

"Incidentally, while I'm saying that though, let me make sure you understand the rule. We would not do it any differently anyway but the Federal rules are very clear on this — your employer may not promise you any benefits in order to get you to vote one way or another in this kind of a contest, nor may your employer make any threat of a reprisal for voting a certain way. We won't know how any one of you voted anyway so don't worry about it. But this is not the way we believe in doing business in any event, so I want to make sure you understand in case I may not always be clear in what I say. So if some of you think that there is an implication that I'm promising something to you or threatening you in some way that is not my intention in anything I have to say today." (Resp. Exh. 6—p. 2, lines 3-15).

"It is contrary to the laws of the United States for me to offer you anything by way of an economic improvement for you to vote one way or the other or for me to threaten you with any kind of reprisal, in case you do vote a union in. So, please, don't misunderstand anything I am going to say today. I recognize the rules and I intend to abide by them in whatever comments I'm making right now." (Resp. Exh. 7—p. 2, lines 17-23).

... "[O]ne of the rules that has been very firmly established by Federal law here is that in a situation of this sort the employer may not offer any kind of economic inducement to the employees to try to persuade them how to vote. Neither may an employer threaten any form of reprisal in case they vote the wrong way. So, I have to be extremely careful in anything I'm saying to you today. Not even to imply

that we're promising you anything — we're not." (Resp. Exh. 8—p. 11, lines 1-8).

For similar statements, see Resp. Exh. 3, p. 4, lines 5-7; Resp. Exh. 4, p. 3, lines 10-11; Resp. Exh. 5, p. 5, lines 29-31, p. 12, lines 28-29; Resp. Exh. 6, p. 9, lines 2-9, 26-32, p. 10, lines 1-4; Resp. Exh. 7, p. 1, lines 20-26, p. 3, lines 4-18, p. 13, lines 7-15; Resp. Exh. 8, p. 2, lines 31-32, p. 3, lines 1-3, 17-27, p. 16, lines 1-3; Resp. Exh. 9, p. 1, lines 5-10, p. 3, lines 1-13, p. 9, lines 9-22.

The non-coercive effect of the speeches is revealed both from a review of the transcriptions in their entirety and from listening to the tapes, which were received in evidence for all purposes. (Tr. p. 263). The amicable tone of the speeches and the audience response, in terms of laughter and persistence in asking questions if unsatisfied with the first answer, demonstrate that the atmosphere was not one of fear and coercion.

Avoiding references to the foregoing statements and without reviewing the total effect of the speeches, the Board by use of conclusory generalizations and quoted excerpts taken out of their proper context attempted to convey the impression that the speeches contained threats of reprisal. For example, the excerpt on pages 4-5, taken from page 14 of the sixth speech (Resp. Exh. 8) — "[N]egotiations [don't] start from where the benefits are . . . you start from scratch" — was taken wholly out of the context in which it was made, which was as follows:⁸

"And as has been mentioned now, in some of the fliers and material I have seen, the union people would have you believe that when a negotiation starts in a situation like that, that you start from where the benefits are. It ain't so. You start from scratch. In negotiating." (Resp. Exh. 8, p. 14, lines 28-32).

⁸ See also quote commencing on last line of p. 5 of the Boards' brief, which omits Hennemuth's qualification — "legally if I may in this sense." (R. 21, line 49; Resp. Exh. 3, p. 4, line 16).

On page 6 of its brief the Board refers to Hennemuth's answer to employee sick-leave questions. In quoting excerpts of Hennemuth's predictions with respect to sick leave the Board omits those portions of Hennemuth's responses which explain in detail the economic reasons why sick leave could not be granted. The sick leave issue first arose during the questioning following the speech to the first group of employees when in response to a question, Hennemuth stated the following:

"Wait a minute. So don't feel that just because you vote a union here you're going to get paid sick leave. Because, I'd like to tell you, this is one thing we're firm about and the only reason why, it's strictly cost. Our last estimate in reference to this was it was going to cost us two million dollars to put in the kind of paid sick leave program around the country that we'd like to put in because we don't believe on fringe benefits in discriminating one plant against the other." (Resp. Exh. 3, p. 15, lines 22-29).

In the speeches to the second, fourth, fifth, and seventh groups, Hennemuth made similar predictions with respect to sick leave and in each case explained the economic justification for Raytheon's position. (Resp. Exh. 4, p. 9, lines 23-31; Resp. Exh. 6, p. 3, lines 16-31; Resp. Exh. 7, p. 5, line 27, p. 6, line 22; Resp. Exh. 9, p. 6, line 13- p. 7, line 9). The transcriptions of the speeches to the third and sixth groups do not reveal any predictions with respect to sick leave. (See Resp. Exhs. 5 and 8).

The Board also states on page 6 of the brief that Hennemuth "announced the institution of a new grievance procedure." Such a statement is an elaborate expansion of the actual remarks made by Hennemuth on this subject. The matter initially was not part of the prepared speech. In response to a question from the first group relating to the integrity of the grievance procedure, Hennemuth stated that it was the responsibility of his

office to receive and to investigate any claims of "inequity" by Raytheon employees. (Resp. Exh. 3, p. 11, lines 26-34).

Similar statements were made to the second, third, fourth and sixth groups, Hennemuth noting in each instance that his office was charged with investigating complaints from human beings anywhere in the company. (Resp. Exh. 4, p. 3, line 30- p. 4, line 1; Resp. Exh. 5, p. 9, lines 12-14; Resp. Exh. 6, p. 5, lines 29-32; Resp. Exh. 8, p. 12, lines 20-24.) In mentioning this subject to the fourth group, Hennemuth stated as follows:

"One other thing that you may not know that you should know because its been established for a long time, my office has been charged with the responsibility of curing inequities that involve human beings anywhere in the company." (Resp. Exh. 6, p. 5, lines 29-32).

The transcriptions of the speeches made to the fifth and seventh groups do not reveal any reference was made to the responsibility of Hennemuth's office to investigate employee complaints. (See Resp. Exhs. 7 and 9).

The only other issue before the Court in addition to the challenge to the Hennemuth speeches is whether Raytheon violated Section 8(a)(1) by statements of Supervisor Krest to employee Alvarado, an outspoken union adherent, who had worn a union badge for more than two months prior to the election. (Tr. p. 24). The conflicting testimony of Krest and Alvarado and findings of the Trial Examiner will be reviewed in the Argument, herein. The Board's complaint did not allege that any other Raytheon supervisor or management representative had engaged in coercive interrogation or conduct. (R. 6-9).

Questions Presented

1. Did the Hennemuth speeches contain threats of reprisal or force or promise of benefit within the meaning of Section 8(c) of the Act so as to remove the speeches from the protection of that section and the First Amendment to the Constitution of the United States?
2. Were the statements of Supervisor Krest to Employee Alvarado of such a serious nature with sufficient impact on employees in the unit to require a finding of a violation of Section 8(a)(1) and an issuance of a cease and desist order on the basis of said statements alone without regard to the validity of the Hennemuth speeches?

ARGUMENT

THE FINDINGS OF THE TRIAL EXAMINER AND THE BOARD THAT RAYTHEON VIOLATED SECTION 8(a)(1) ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AND ARE INCORRECT AND ERRONEOUS AS A MATTER OF LAW.

- A. The Findings of the Trial Examiner and the Board that the Hennemuth Speeches were not Protected by Section 8(c) of the Act and the First Amendment to the Constitution are not Supported by Substantial Evidence in the Record and are Incorrect and Erroneous as a Matter of Law.

As noted in the Statement, it is Raytheon's position that the statements in the Hennemuth speeches found by the Trial Examiner and the Board to have violated Section 8(a)(1) are protected by Section 8(c) of the Act and the First Amendment to the Constitution. Section 8(c) provides as follows:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

This Court has recognized that Section 8(c) is a limitation on the Board's authority to issue orders directed to employer speech. *NLRB v. TRW-Semiconductors, Inc.*, 385 F 2d 753 (CA 9, 1967); *Salinas Valley Broadcasting Corporation v. NLRB*, 334 F 2d 604 (CA 9, 1964).

It is submitted that the standard of review which should be applied by this Court is whether the Board's determination that the statements were not protected by Section 8(c) is incorrect as a matter of law. In view

of the nature of the issue, the Board's suggestion on page 9 of its brief that the "function of drawing the rather nebulous line between permissible persuasion and prohibited coercive conduct lies within the special competence of the Board" should not be adopted.

It is well established that the Board's findings on questions of fact must be based on substantial evidence on the record considered as a whole. 5 USC 1009(e); 29 USC 160(e); *Universal Camera Corporation v. NLRB*, 340 US 474 (1951); *NLRB v. Pittsburgh S. S. Co.*, 340 US 498 (1951). "All relevant questions of law" are to be decided by the reviewing court. 5 USC 1009(e).

It is submitted that the application of Section 8(c) to the Hennemuth speeches is a question of law which must be decided by this Court. In an excellent analysis in 4 K. Davis, *Administrative Law Treatise*, (1958) ch. 30, the commentator reviews the bases for distinguishing between questions of fact (with respect to which the administrative agency's findings are entitled to enforcement if supported by substantial evidence), and questions of law (with respect to which the court must decide whether the agency's findings are correct). The question as to whether speech is protected by statute and the Constitution would appear to be clearly a question of law but Davis submits that to avoid meaningless semantical argument, the application of the "substantial evidence" or "correctness" tests should be based on factors such as: the comparative competency of the court and the agency to determine the issue in question, and the extent to which Congress limited the agency's power with respect to the issue.

Viewed in the light of these factors, the application of Section 8(c) to the Hennemuth speeches is a question to be decided by this Court. The scope of statutory and Constitutional guarantees of free speech is an issue which this Court is at least as well qualified to decide as

the Board, an agency composed in part of non-lawyers and limited in expertise to the field of labor-management relations. The exercise of this expertise, while entitled to considerable weight with respect to such matters as the composition of appropriate bargaining units, must be more closely reviewed when it directly relates to protection of statutory and Constitutional guarantees of free speech, a province traditionally reserved for the courts.

Moreover, as noted above, Section 8(c) was specifically included in the Act for the purpose of preventing the Board from ignoring such guarantees. Consequently, such Congressional purpose would be frustrated if the Board were permitted to determine at will the scope of a limitation on its own power.

In any event, regardless of whether the application of Section 8(c) to the Hennemuth speeches is considered a question of fact or a question of law, enforcement of this portion of the Board's order must be denied since its findings with respect to the Hennemuth speeches cannot be sustained under either the "substantial evidence" or "correctness" standards. *Automation and Measurement Division, The Bendix Corporation v. NLRB*, _____ F 2d ____, 69 LRRM 2157 (CA 6, August 30, 1968); *NLRB v. Golub Corporation*, 388 F 2d 921 (CA 2, 1967); *NLRB v. TRW-Semiconductors, Inc.*, 385 F 2d 753 (CA 9, 1967).

The courts have recognized that findings by the Board of Section 8(a)(1) violations solely on the basis of writings and speech must be carefully reviewed to determine whether the Board's decision is consistent with Section 8(c) and the First Amendment. *NLRB v. Golub Corporation, supra*; see also *NLRB v. Exchange Parts Company* 375 US 405, 409 fn. 3 (1964).

The general purpose of Section 8(c) was expressed by the Supreme Court in *Linn v. United Plant Guard Workers of America, Local 114*, 383 US 53 (1966), as follows:

“We acknowledge that the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management. And, as we stated in another context, cases involving speech are to be considered “against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.” *New York Times v. Sullivan*, 376 U.S. 254 270 (1964). Such considerations likewise weigh heavily here; the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth.” (383 US at 62, 63).

This Court cited the foregoing passage from the *Linn* case with approval in *NLRB v. TRW-Semiconductors, Inc.*, 385 F 2d 753 (CA 9, 1967) and then stated:

“As the court said in *Southwire Co.*, supra,— F.2d at—, 65 LRRM 3042:

“The guaranty of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available. It is an adversary proceeding and hardly impartial. . . .

The mere fact that campaign propaganda may induce fear — and be intended to produce fear — does not deprive it of the protection of section 8(c). That is often the nature of campaign propaganda.”

In *NLRB v. J. Weingarten, Inc.*, 339 F 2d 498 (CA 5, 1964), the Fifth Circuit stated that the test in determining whether statements of an employer are entitled to the protection of 8(c) is as follows:

“whether, in the whole context in which the remark was made, it was reasonably subject to the construction by the listener that a union victory meant that the employer would *intentionally institute economic reprisals*.” (339 F 2d at 501) (emphasis supplied).

In finding that certain portions of the Hennemuth speeches violated Section 8(a)(1), the Trial Examiner and the Board have adopted a narrow mechanical approach, blindly imputing unrealistic interpretations as to meaning and impact of Hennemuth's moderate and reasoned presentation of facts which the employees could properly consider prior to the election. The Trial Examiner summarized his "concluding findings" that Hennemuth speeches violated Section 8(a)(1) as follows:

"In sum, for all their carefully contrived appearance of amiability, the Hennemuth speeches were larded with statements which amount to an anticipatory refusal to bargain and as such were poorly concealed threats to deprive Respondent's employees of any and all benefits to be derived from the exercise of the right to collective bargaining through representatives of their own choosing." (R. 23, lines 23-29).

This finding is not only wholly unsupported by the evidence in the record but is phrased so ambiguously that serious doubt is raised as to whether the Trial Examiner actually found that the speeches contained statements which constituted intentional threats of economic reprisal within the meaning of Section 8(c). Although in its brief the Board attempted to imply that the Hennemuth statements reflected a retaliatory intent, regardless of economic circumstances, the Record is devoid of support for such an inference.

Ignoring the following: 1) Hennemuth's specific statements set forth in the Statement, to the effect that the decision as to union representation was entirely up to the employees and that Raytheon could not and would not make threats or promises to influence that decision, 2) Raytheon's bargaining relationships at other plants, evincing a lack of anti-union animus, and 3) the total context in which the remarks were made, the Trial Examiner and the Board based their finding of violation of Section

8(a)(1) upon selected statements made in connection with Hennemuth's explanation of the realities of collective bargaining.

In explaining the collective bargaining process, Hennemuth stated that a union could not guarantee anything, that the Company must agree before union proposals can be placed in effect, and if the Company does not agree the union's only recourse is to strike. (R. 21; Tr. pp. 31-32; Resp. Exh. 3, p. 4; Resp. Exh. 5, p. 1; Resp. Exh. 7 p. 3; Resp. Exh. 8, p. 4; Resp. Exh. 9, p. 3). Such an explanation is merely a restatement of one of the basic principles of the law of collective bargaining — each party must agree to wages, benefits and other terms of a collective bargaining contract.

This Court has recently approved comparable statements directed to advising employees as to the realities of collective bargaining. *NLRB v. TRW-Semiconductors, Inc.*, 385 F 2d 753 (CA 9, 1967); *Don The Beachcomber v. NLRB*, 390 F 2d 344 (CA 9, 1968); *NLRB v. Sonora Sundry Sales, Inc.* _____ F 2d _____, 68 LRRM 3000 (CA 9, August 2, 1968).

The following explanation of collective bargaining held by the Court to be legitimate in *NLRB v. TRW-Semiconductor, supra*, is almost identical in practical effect to the one given by Hennemuth.

“The union can promise anything, but can it deliver? In fact, it may not be able to keep all the things the employees already have. No one can assume that if an outside union gets into our company that all the fine things we now enjoy will automatically be continued. If TRWS should be forced into negotiation with the union, the company would have to begin from scratch and bargain hard to protect our competitive position.”

Recognizing the well founded impediment to its position presented by *NLRB v. TRW-Semiconductor, supra*, the Board on page 15 of its brief attempts to distinguish

the case on the ground that, "here the Company never offered an economic justification for its asserted bargaining policy." To the contrary, both the testimony of the General Counsel's witnesses and the tape transactions demonstrate that the Hennemuth speeches were replete with references to the Company's economic position and the fact that this position would have to be considered by the Company in making decisions with respect to wages and fringe benefits. (Tr. p. 34, line 23 — p. 35, line 8; Tr. p. 79, lines 17-22; Tr. p. 108, line 23 — p. 109, line 4; Tr. p. 131, lines 17-21; Tr. p. 143, 14-19; Tr. p. 170, line 23 — p. 171, line 4; Resp. Exh. 3, pp. 8-9, 15, 16, 17; Resp. Exh. 4, pp. 2-3, 9; Resp. Exh. 5, pp. 4-5; Resp. Exh. 6, pp. 6-7, 12; Resp. Exh. 7, pp. 6, 8-9, 12; Resp. Exh. 8, pp. 9-10; Resp. Exh. 9, pp. 6-7, 8-9).

The Sixth Circuit's recent decision in *Automation and Measurement Division, The Bendix Corporation v. NLRB*, _____ F 2d_____, 69 LRRM 2157 (CA 6, August 30, 1968) is also directly in point. In that case the validity of two Board elections, the first won by the employer and second won by the union, was in question as the Board was seeking to enforce a refusal to bargain order against the employer. The first election was set aside on the basis of an employer's letter which stated that bargaining was a "two-way street", that wages and benefit programs "would be altered *upward or downward, created or eliminated*, as a result of this bargaining", and that bargaining "would have to begin from the *zero point*, item by item!" The union responded by implying that the U. S. Government and NLRB guaranteed that employees would lose no benefits except those they wished to change. In holding that the statements in the employer's letter were not coercive and that the first election won by the employer should have been found valid, the court noted as follows:

"The right of free speech guaranteed by Section 8(c) of the Act applies to employers and labor

unions alike. There is no basis for adopting a narrow restrictive rule for one party and a liberal one for the other.” (69 LRRM at 2160).

In the instant case, the IUE had conducted a vigorous campaign, distributing 20 to 25 leaflets to the employees over the course of the organizing effort; and Hennemuth’s statements were directed specifically to claims in the union leaflets that Federal law required bargaining to start at the present level of benefits. (Tr. p. 219; Resp. Exh. 6, p. 9, lines 22-25; Resp. Exh. 8, p. 14, lines 28-32). As noted in the Statement, the Board not only failed to consider the effect of the IUE’s claims that bargaining would start at the present level, but intentionally omitted reference to such claims in quoting an excerpt from the Hennemuth speeches.

In *NLRB v. Herman Wilson Lumber Co.*, 355 F 2d 426 (CA 8, 1966), the court found the following explanation of collective bargaining to be within the protection of Section 8(c) :

“Herman Wilson [president] does not want a Union in this plant * * * and I will fight the Union in every legal way possible. * * * If a Union wins all it wins is the right to bargain — nothing more * * *

“Do you realize that the only way a union can try to force your Company to do anything that it is unwilling to do would be to pull you out on strike. If the Union calls an economic strike you place your job on the line. You can be permanently replaced. You can lose your job.

“An economic strike could cause us to lose business. This might cause us to have to shut down the plant. If so, you would be without a job. * * *

“This Union is going to find me to be the most disagreeable person it ever ran up against. I told you last week I was going to fight this Union in every legal way possible, and I mean it. * * *

“In dealing with the Union *I’ll deal hard with it—I’ll deal cold with it—I’ll deal at arm’s length with it.*

“You know, or if you don’t you should know before you vote that I am not obligated by law to agree to any proposals the Union makes on wages, hours, working conditions, or what have you. *If the Union wins the election we will be obliged to negotiate with it, but we are not obligated to agree to any proposals or request that it makes. We are not required to make any concession to it.*” (emphasis supplied) (355 F 2d at 429).

There can be no question that if the foregoing remarks are entitled to the protection of Section 8(c), Hen-nemuth’s much more temperate explanation of collective bargaining is also entitled to such protection.

In *Belknap Hardware and Manufacturing Co.*, 157 NLRB 1393 (1966) the Board itself has approved the following much more questionable explanation of collective bargaining as privileged within Section 8(c):

“... *no union can guarantee you a job. No union can guarantee you steady work. No union can guarantee you an increase in wages. No union can guarantee you more benefits than you now have.* You have absolutely no guarantee or assurance whatsoever that the Teamsters Union can make good on one single promise they have made you, or that they can do one single thing for you.” * * *

“The only thing the Teamsters Union can really guarantee you is *trouble* and that they will be around on pay day to get their hands in your pockets and in your paychecks. Unions cannot exist without trouble and they cannot exist without the money they collect in the form of dues, initiation fees, fines and assessments.” ...

“*Not only will there be no automatic wage increases or other benefits if the Union wins the election, but just exactly the opposite is true.*” ...

“Voting for a union does not automatically bring any increases or any benefits or any job security

to you. If this Union were to win the election tomorrow there would still be only one way that it could try to force us to agree to any of its demands which we thought were unreasonable or which we otherwise couldn't see our way clear to agree to. *That would be by pulling you out on strike!* Now without intending to seem abrupt, I hope you will realize and understand — while there is yet time — that Belknap has no intention of yielding to any such pressure as that — *ever.*”

“[The Union organizer] says that if the Teamsters Union wins the election they will attempt to negotiate with Belknap the Teamsters pension plan’. If the Union organizer thinks for one moment Belknap would agree to seeing the pension plan we now have and to which we have already contributed several million dollars go down the drain, he is badly mistaken and even more stupid than we think he is.”

(Emphasis supplied) (157 NLRB at 1396-1399).

Moreover, in *Trent Tube Co.*, 147 NLRB 538 (1964), the Board concluded that a statement that “present benefits would not necessarily continue under a union contract and that bargaining starts from scratch” was legitimate campaign propoganda and merely “partisan electioneering”, falling short of objectionable conduct, let alone a violation of 8(a)(1) of the Act; see also *Crane Co.*, 145 NLRB 587 (1963); *George Groh and Sons*, 145 NLRB 775 (1963).

If the Board's position is sustained in this case, the effect would be to prohibit employers from pointing out to employees the adverse consequences of union representation. Such a ruling entirely ignores decisions of the Courts of Appeals holding that such statements are protected by Section 8(c). *NLRB v. Golub Corporation*, 388 F 2d 921 (CA 2, 1967); *NLRB v. TRW-Semiconductors, Inc.*, 385 F 2d 753 (CA 9, 1967); *Southwire Company v. NLRB*, 383 F 2d 235 (CA 5, 1967); *NLRB v. River Togs, Inc.*, 382 F 2d 198 (CA 2, 1967); *NLRB v. Morris Novelty Co. Inc.*, 378 F 2d 1000 (CA 8, 1967);

Caribe General Electric, Inc. v. NLRB 357 F 2d 664 (CA 1, 1966); *Texas Industries, Inc. v. NLRB*, 336 F 2d 128 (CA 5, 1964); *Union Carbide Corporation v. NLRB*, 310 F 2d 844 (CA 6, 1962).

In addition to the explanation of collective bargaining, the Trial Examiner based his finding that the Hennemuth speeches indicated an anticipatory refusal to bargain and, consequently, a threat of reprisal, upon statements to the effect that Raytheon, on the basis of a comparison with other national electronics companies, had a good series of benefits, which Hennemuth was satisfied would not have been any better even if the employees had had a union, and which in the future would not be any better just because a union was on the premises. This finding again reflects the Trial Examiner's failure to distinguish between a prediction and a threat that retaliatory measures will be taken if a union is selected. *Belknap Hardware & Manufacturing Co.*, 157 NLRB 1393 (1966).

In *NLRB v. Laars Engineers, Inc.*, 332 F 2d 664 (CA 9, 1964), this Court held that the following statement relating to an employer's level of benefits was protected by Section 8(c) and did not justify the "narrow and strained" construction given to it by the Board:

"Is it worth letting yourself be talked into the possible loss of your job and the sure loss of a pleasant place to work when you are already getting much more than this same union has gotten for its members in this industry, *and you are already getting all the wages and benefits we can possibly pay?* Just look at the record and you will see that a 'yes' vote is a vote for a union which has obtained. . .

lower wages
fewer benefits
more union dues
more union assessments
possible strikes

A 'NO' vote is a vote for . . .

higher wages
more benefits
no dues
no assessments
no strikes

Only *you* can decide." (332 F 2d at 666) (emphasis supplied).

The Trial Examiner and the Board in its brief both made particular reference to the statements by Hennemuth regarding sick leave. As noted in the Statement, Hennemuth carefully explained the economic reasons why Raytheon was not in a position to grant sick leave at this time. The Trial Examiner and the Board failed to accord proper weight to this explanation. Since the sole reason sick leave could not be granted was explicitly stated as being Raytheon's uniform fringe benefit policy and the cost involved, there is no basis for the inference that sick leave would not be granted as retaliation for selection of a union as collective bargaining representative. Under these circumstances the sick leave statements are privileged under Section 8(c). *NLRB v. Herman Wilson Lumber Company*, 355 F 2d 426 (CA 8, 1966). Indeed, it would have been misleading for Raytheon to have indicated by its failure to respond to union campaign emphasis on the sick leave issue that employees would automatically receive this benefit if the union were selected.

As noted in the Statement, the Board found contrary to the Trial Examiner, that the announcement of "new grievance procedures" constituted a further violation of Section 8(a)(1). The Board's reversal of the Trial Examiner again reflects the narrow, mechanical approach the Board adopted in determining whether the Hennemuth speeches were protected by Section 8(c). During the course of the speeches, Hennemuth informed the employees that one of his functions is to investigate com-

plaints by Raytheon employees at all of the Company's locations to make certain that local management was acting equitably in employee relations matters. These statements, however, did not change the existing procedure, because as the Trial Examiner recognized, all Raytheon employees had the right to present grievances or complaints to Hennemuth. If, as the Board apparently concluded, this right to "appeal" to Hennemuth was presented to influence votes, it undoubtedly would have been included in the prepared portion of the speech to the first group. It is apparent that the subject arose only because questions relating to the grievance procedure indicated to Hennemuth that the questioner might not be aware that employees at Mountain View had the same right as any other Raytheon employee to write Hennemuth's office directly regarding a complaint or grievance.

In sum, the conclusion of the Trial Examiner and the Board that Hennemuth's moderate and reasoned presentation of facts the employees could properly consider prior to the election was not protected by Section 8(c) and the First Amendment, and consequently constituted a violation of Section 8(a)(1), is not supported by substantial evidence and is contrary to established precedent.

B. The Findings of the Trial Examiner and the Board that Raytheon Violated Section 8(a)(1) through Statements made by Supervisor Krest to Employee Alvarado are not Supported by Substantial Evidence and are Erroneous and Incorrect as a Matter of Law.

As noted in the Statement, the emphasis given by the Trial Examiner to the effect that Respondent's violation of Section 8(a)(1) was in "major part" though the Hennemuth speeches raises considerable doubt as to whether the Trial Examiner and the Board would have

concluded that the statements by Krest to Alvarado, standing alone, were a sufficient basis for a finding of a violation of Section 8(a)(1) by Respondent. In any event a review of the Trial Examiner's findings, adopted by the Board, with respect to the Krest statements demonstrates that such statements do not constitute a sufficient basis to support the finding of a Section 8(a)(1) violation.

The respective testimony of Krest and Alvarado was summarized by the Trial Examiner as follows:

Krest . . . testified . . . that on the occasion of the first conversation he called Alvarado to his desk with respect to her requested transfer out of his department, and that Alvarado initiated the topic of unions by saying that if the employees had a union "things like this [the refusal of a transfer] wouldn't happen." Krest testified, "From that point on, we discussed several things about the union," and, in amplification, mentioned the topics of seniority and work standards. On the latter he testified, "I said that I am quite sure that if a union did come into the plant that the union, if they weren't satisfied with the standards which we had on the jobs, would bring in their own industrial engineers. I felt that if they found that our standard was extremely low, they would raise it, you know, if they thought it was completely out of the picture." Krest did not recall if the union was discussed in his second conversation with Alvarado which was concerned primarily, as was the first, with her request for a transfer. (R. 20).

Alvarado testified that:

Krest asked Alvarado why she wanted a union, she replied that she thought a union could provide employees with a better vacation and sick leave plan and higher wages, Krest replied that it would be impossible for the employees to achieve such additional benefits, that he had

not complained to the employees on their work standards, but with a union certain work standards would be set and any employee not meeting them could be discharged; that if the Union was voted in, any employee who was late to work on more than three occasions would be discharged. On the second occasion Krest asked Alvarado if she had attended an IBEW meeting and if so, why. (R. 19-20).

The Trial Examiner failed to make credibility findings to resolve the conflict in testimony between Krest and Alvarado and gave no reasons for crediting the testimony of Alvarado as against that of Krest, instead he made the following ambiguous and conclusory finding:

“I find, in sum, that Foreman Krest questioned Alvarado concerning her union activities, interrogated her concerning her desire for union prerepresentation, and stated, in substance and effect, that she stood to lose rather than gain through union representation in the matter of work standards, and would be unable to obtain the benefits she sought.” (R 20)

Even if the Trial Examiner had credited Alvarado's testimony and given reasons therefor, the evidence would not support the finding of a violation of Section 8 (a)(1). It is well established that the alleged interrogation as to why Alvarado wanted a union or why she had attended an IBEW meeting in view of the fact that she had consistently worn an IUE badge for more than two months, standing alone, is not unlawful. *Salinas Valley Broadcasting Corporation v. NLRB* 334 F 2d 604 (CA 9, 1964); *S. H. Kress & Co. v. NLRB* 317 F 2d 225 (CA 9, 1963); *NLRB v. Southern California Associated Newspapers*, 299 F 2d 677, 679-680 (CA 9, 1962); *NLRB v. Associated Dry Goods Corp.*, 209 F 2d 593 (CA 2, 1954). In *Salinas Valley Broadcasting Corporation v. NLRB*, *supra*, this Court expressed the rule as follows:

[2] The mere act of questioning employees concerning union membership is not unlawful in itself. *S. H. Kress & Co. v. N.L.R.B.* 9 Cir. 1963, 317 F 2d 225. We know of no statute or rule of law that prevents an employer from properly "ascertaining" whom among its employees are seeking to unionize the business. The test is whether what is done by the interrogation interferes with the employee's protected rights. It is the method used; the circumstances existing at the time; and what the employer thereafter does, that is material to proof of illegal action. Management is not interdicted from "ascertaining" which employees want a union. The charges management must answer are whether: (1) it interfered with, restrained or coerced employees (§ 8(a)(1)); (2) it discriminated in regard to tenure of employment (§ 8(a)(3)). (334 F 2d at 607).

The non-coercive nature of Krest's alleged interrogation of Alvarado is apparent. Alvarado had publicly displayed her IUE organizing badge for more than two months and was obviously an open and enthusiastic supporter of the union.

Moreover, on the basis of this Court's decision in the *Salinas* case, Krest's alleged statements that it would be impossible for employees to achieve the benefits which Alvarado sought and that work standards would be set and discipline imposed for violation of said standards, does not constitute a violation of Section 8(a)(1). In that case, the president of respondent company told an employee that if he had a "union [the employees] would lose out on some benefits." 334 F 2d at 608. This Court had the following to say about this remark:

"The second can be characterized under case law as a threat of economic reprisal against an employee. Cf. *National Labor Relations Board v. Elias Brothers Big Boy, Inc.* 6 Cir. 1963, 325 F. 2d 360, 365. However, we must remember the employer's right of free speech is still protected under the Act. 29 U.S.C. § 158(c). *National Labor Relations Board v. Cosco Products*, 5 Cir. 1960 F. 2d 905, 908." . . . (334 F 2d at 608).

“An unlawful intent is not lightly to be inferred. It cannot rest on remote or speculative evidence. *National Labor Relations Board v. Citizen-News*, 9 Cir. 1943, 134 F 2d 970. It should not rest upon an inference which itself rests on an inference.” . . .

“Neither mere inquiry by employer of employees, without harassment or undue frequency, as to the fact of the existence of a plan to unionize, nor a single somewhat vague prediction of anticipated loss of economic benefits can be transformed or transmuted by the magic or semantic labels into “repeated interrogations” or “threats of economic reprisals,” sufficient to swing the balance against the other facts in the record.” (334 F 2d 614).

Viewed in the context in which they were made, Krest’s alleged statements were merely expressions of personal opinion made by one supervisor to one employee and as such were insufficient to support a finding of violation of Section 8(a)(1). *NLRB v. Mallory Plastics Company*, 355 F 2d 509 (CA 7, 1966); *J. S. Dillon & Sons Stores Co. v. NLRB*, 338 F 2d 395 (CA 10, 1964); *NLRB v. Crosby Chemicals, Inc.*, 274 F 2d 72 (CA 5, 1960); *NLRB v. Plankinton Packing Company*, 265 F 2d 638 (CA 7, 1959); *NLRB v. Houston Chronicle Pub. Co.* 211 F 2d 848 (CA 5, 1954); *NLRB v. Associated Dry Goods Corp.*, 209 F 2d 593, (CA 2, 1954).

Krest as a first level supervisor was in no position to place into effect more stringent work rules in reprisal for selection by the employees of a union as their collective bargaining representative, particularly in view of the statements in Hennemuth’s speeches that the Company could not and would not make promises or threats of reprisal to influence the employee’s position with respect to union representation. Any remarks made by Krest to Alvarado on this issue can only be regarded as participation in a typical exchange of opposing viewpoints on a subject of interest.

Finally, it must be emphasized that this one isolated incident involving a minor supervisor is insufficient to demonstrate that the Company was enforcing a plan of coercion and therefore must be regarded as *de minimis*. *NLRB v. Dale Industries, Inc.*, 355 F 2d 851 (CA 6, 1966); *Union Carbide Corporation v. NLRB*, 310 F 2d 844 (CA 6, 1962); *NLRB v. Grunwald-Marx, Inc.*, 290 F 2d 210 (CA 9, 1961); *NLRB v. Mississippi Products, Inc.*, 213 F 2d 670 (CA 5, 1954); *NLRB v. Cleveland Trust Co.*, 214 F 2d 95 (CA 6, 1954). The Board itself has recognized the minimal effect of isolated coercive statements by supervisors. In *Morganton Full Fashioned Hosiery Co.*, 107 NLRB 1534 (1954) the Board held that coercive statements by two supervisors were insufficient to warrant setting aside an election, even though the standard in evaluating conduct for purposes of setting aside elections is considerably more stringent than that applied in determining whether conduct constitutes an unfair labor practice. In *Morganton Full Fashioned Hosiery Co.*, *supra*, the Board stated as follows:

“Lastly, the hearing officer found that prior to the election, two supervisors made coercive statements, each to one employee, to the effect that the plant could close down in the event of a Union victory in the election, and that those statements interfered with the holding of a free election. We do not disagree with the facts found by the hearing officer, as distinguished from his conclusion of interference. We believe, however, that these two coercive remarks are too isolated in nature to constitute substantial interference and thus warrant setting aside an election involving some 639 employees. While the Board has frequently referred to its elections as conducted in a ‘laboratory atmosphere,’ the adoption of a laboratory standard should not be construed to mean that the Board will ignore the realities of industrial life. In this respect, we are not unmindful of the fact that the ‘laboratory’ for election purposes is usually an industrial plant where vigorous campaigning and discussion normally take place, and where isolated deviations from the above-mentioned stand-

ard will sometimes arise, notwithstanding the best directed efforts to prevent their occurrence. In view thereof, we are of the opinion that an employee mandate can not lightly be set aside merely because the normal and expected plant discussion happens to include a few isolated threats by overzealous supervisory personnel." (107 NLRB at 1537, 1538).

See *Goodyear Clearwater Mill No. 2*, 109 NLRB 1017 (1954).

The Trial Examiner and the Board failed to give any weight to the absence of even allegations in the complaint that any of the other supervisors or management representatives at the plant had made coercive statements. To ignore such facts "is to ignore the mandate of the two statutes [Administrative Procedure Act and National Labor Relations Act] that decision shall be based upon the record considered as a whole." *Pittsburgh S.S. Co. v. NLRB*, 180 F 2d 731, 742 (CA 6, 1950), aff'd 340 US 498 (1951).

In sum, this Court should conclude that the findings of the Trial Examiner and the Board that Krest's alleged statements to Alvarado violated Section 8(a)(1) of the Act are not supported by substantial evidence and are erroneous and incorrect as a matter of law.

CONCLUSION

On the basis of the foregoing, we respectfully submit that the Board's petition for enforcement in No. 22, 572 should be denied in its entirety.

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September, 1968

APPENDIX

Section 8(a)(1) of the National Labor Relations Act provides as follows:

Section 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain or coerce employees in the exercise of their rights guaranteed in Section 7.

Section 7 provides as follows:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 10(e) of the National Labor Relations Act (29 USC 110(e)) provides in relevant part as follows:

. . .“The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.”

Section 6 of the Administrative Procedure Act (5 USC 1009(e)) provides as follows:

Section 1009(e). Scope of review.

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. It shall—

(A) compel agency action unlawfully withheld or unreasonably delayed; and

(B) hold unlawful and set aside agency action, findings, and conclusions found to be—

Appendix (Continued)

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) contrary to constitutional right, power, privilege, or immunity;

(3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(4) without observance of procedure required by law;

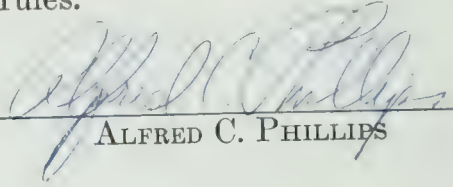
(5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with these rules.

A handwritten signature in cursive script, appearing to read "Alfred C. Phillips", is written over a horizontal line.

ALFRED C. PHILLIPS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,572

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

RAYTHEON COMPANY, Respondent

No. 22,572A

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND
MACHINE WORKERS, AFL-CIO, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent
and

RAYTHEON COMPANY, Intervenor

ON PETITION FOR ENFORCEMENT AND ON PETITION TO REVIEW
AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,572

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

RAYTHEON COMPANY, Respondent

No. 22,572A

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND
MACHINE WORKERS, AFL-CIO, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

and

RAYTHEON COMPANY, Intervenor

ISSUES PRESENTED

I. Whether substantial evidence on the whole record supports the Board's findings that the Company violated Section 8(a)(1) of the Act.

II. Whether the Board properly refused, in view of the General Counsel's objection, to allow the charging party union to expand the scope of the litigation before the Board.

JURISDICTION

This case is before the Court on the petition of the National Labor Relations Board for enforcement of its order issued against Raytheon Company on October 5, 1966 (Case No. 22,572), and on the petition to review filed by the International Union of Electrical, Radio and Machine Workers, AFL-CIO (Case No. 22,572A), pursuant to Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29

U.S.C., Sec. 151, *et seq.*).¹ The Board's Decision and Order (R. 41-44, 18-27)² are reported at 160 NLRB 1603. This Court has jurisdiction, the unfair labor practices having occurred at Mountain View, California, where the Company is engaged in the manufacture of electronic components.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

A. Background of events

In the fall of 1964, two unions³ initiated organizing drives seeking to represent the Company's production and maintenance employees. The ensuing representation election, which the unions lost, was conducted on February 4, 1965. Protesting that the Company's pre-election conduct was violative of the Act and had improperly affected the election results, the International Union of Electrical, Radio and Machine Workers, AFL-CIO (herein the Union) filed objections to the election, as well as unfair labor practice charges with the Board (G.C. Exh. 1(a) and 2(d)). Only the unfair labor practices are at issue in the instant proceeding.

B. The Company's preelection campaign

During the week immediately preceding the February 4 election, employee Carol Alvarado was twice called to the desk of her supervisor, Nic-

¹The pertinent statutory provisions are reprinted in the Appendix, *infra*, p. 24.

²References to the pleadings reproduced as "Volume I, Pleadings" are designated "R." References to the stenographic transcript of the hearing reproduced pursuant to Court Rule 10 are designated "Tr." References to the General Counsel's Exhibits and to the Company's Exhibits are designated "G.C. Exh." and "Resp. Exh.," respectively. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

³International Union of Electrical, Radio and Machine Workers, AFL-CIO, and International Brotherhood of Electrical Workers, AFL-CIO.

ola Krest, and questioned concerning her union activities (R. 19; Tr. 24-28). On the first occasion, Alvarado, who was the only employee in her department to wear a union badge, was asked why she wanted a union (R. 19; Tr. 26, 28). She replied that the employees “could use a better vacation plan and sick leave and possibly higher wages” (R. 3, 19; Tr. 26). Krest responded that “these things were all impossible to get . . . that the Union officers were a bunch of crooks and that they lived very expensively in the best of homes, drove very expensive cars. . .” which were paid for out of union dues (R. 2, 19; Tr. 26-27). Alvarado was then reminded that “us girls didn’t really realize how lucky we had it, how well off we were, that he never complained about us—about our work standards. He had never really set any standards and that he never complained about us girls coming in late and about us going to the bathroom for a cigarette . . . [b]ut, he said that if the Union came in all of that would be changed of course, that standards would be set and that we would have a certain length of time to meet them; and, if not, well, that we would be out” (R. 19; Tr. 27). Krest continued, “that this thing of coming in late—we would have three different times that we could do that and the fourth time we would be fired” (R. 19-20; Tr. 27). Two or three days later, Krest again called Alvarado to his desk and informed her that he had heard she had been to a union meeting. Krest wanted to know why she had gone, and stated she did not know what she “wanted or what [she] was doing” (R. 20; Tr. 28).

The Union filed its petition for a representation election on January 4, 1965 (G.C. Exh. 2(a)). On January 14, 1965, the Company wrote its employees “to make known its position in this election” (G.C. Exh. 5). The employees were told in the letter “that a union would [not] be of

any benefit, but rather would be a real interference in the relationship between the Company and its employees for several reasons” (*ibid.*). For example, the Company warned, “A union cannot guarantee any increased wages or benefits. When a union comes into a plant, collective bargaining begins not at the present wage level, but at *zero*. Strike is the Union’s only weapon if it seeks more than the Company can pay” (emphasis in original) (*ibid.*).

In furtherance of this campaign, both the Chairman of the Board and the President of the Company decided that Robert Hennemuth, Vice President for Industrial Relations, should be sent from the Company’s Massachusetts headquarters to “have a chat with the employees” (Resp. Exh. 3, p. 1). Accordingly, on February 2, just two days before the election, Hennemuth gave a prepared “captive audience speech” to seven separate groups of its employees.⁴ Hennemuth spoke from an outline which was organized according to four major points (R. 3, 20; G.C. Exh. 11).

Throughout these speeches Hennemuth stressed that “. . . in a negotiation they [the employees] had to understand that legally the Company and the Union start from scratch . . . what happens in negotiations is that two parties sit down to negotiate and they start fresh—just as though nothing’s on the table . . . in negotiations they have to get up to where you are—where the Company is, first—before you even get any more” (R. 21; R. Exh. 5, pp. 12-13). And, “the whole wage policy and program is something that would be open to negotiation if a union, perish the thought, did come in. . . . [N]egotiations [don’t] start from where the benefits

⁴All speeches were similar in context except as to the ensuing question and answer period. The speeches, in substantial part, were tape recorded and transcriptions thereof were introduced into evidence (R. Exh. 3-9).

are . . . you start from scratch (Resp. Exh. 8, p. 14; Tr. 48, 79, 109, 131, 142, 170).

Hennemuth further emphasized this by pointing out to the employees that if the Union won the election and negotiations ensued the employees might lose some of their existing benefits. As an example, the employees were told that “it is entirely legal and possible for any employer . . . to take the position in negotiations of, we have, say, nine paid holidays now, we’re sick and tired of this expense, we’re not going to from this point on agree to any more than five” (R. 21; Resp. Exh. 6, p. 9, Tr. 271). Hennemuth also added that employee insurance was now free, but “if the Union should come in, that this would have to be negotiated from scratch and that we might possibly end up having to pay for what we were now getting free” (R. 21; Tr. 31, 79-80, 142). Hennemuth also related the story of a company which gave bus fares to its employees, but “when the union did come into the plant, the company took away the bus fare” (R. 21; Tr. 79-80). Finally, the employees were told that they should not be “misled”, for the “things that were in effect at that time would not necessarily be in effect upon acceptance of the Union” (R. 21; Tr. 142).

Throughout the preelection campaign, the employees were also told that the selection of a union would be a useless act. Thus, one Company leaflet stated “No union can guarantee anything which a company is not willing or able to give” (G.C. Exh. 9), and in a second leaflet, issued just prior to the election, “no union could have obtained more for you than your company has already granted voluntarily, *and the same holds true for the future*” (emphasis in original) (G.C. Exh. 11). This theme was reiterated in the Hennemuth speeches. The employees “should bear in mind that a union cannot guarantee you anything. Now I’m telling you, if a union

wins the right . . . to represent the employees involved, a period of negotiation must follow after that point and there comes into being between the union and the company after that only what the company wants to agree to . . .” (R. 21; R. Exh. 3, p. 4). In short, the employees were told that they could not get anything because of the Union that they would not otherwise get from the Company (R. 21; Resp. Exh. 3, p. 9; 7, p. 3; 8, pp. 4, 10; Tr. 153, 177). Thus, in reference to the employees’ questions about paid sick leave, Hennemuth stated “So bear in mind, that even if a union does come on these premises as a result of Thursday (election day), that does not mean any such union will get paid sick leave. And I’m saying to you right now, it won’t” (R. 22; Resp. Exh. 9, p. 6; 3, p. 15; 4, p. 9; 6, p. 3; 8, p. 7).

In these same speeches, Hennemuth announced the institution of an improved grievance procedure. Henceforth, if the employees were dissatisfied with the resolution of complaints and grievances on the plant level, they could appeal directly to the Company’s Industrial Relations Department in Massachusetts (Resp. Exh. 4, p. 13) or write directly to Hennemuth at the Industrial Relations Office (Resp. Exh. 3, pp. 11, 20; 4, pp. 3-4; 5, pp. 9, 15; 6, pp. 5-6; Tr. 81-82, 110-111, 179).

II. THE BOARD’S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board found that the Company violated Section 8(a)(1) of the Act by coercively interrogating its employees as to their union activities; threatening that the employees would suffer a loss of existing benefits in the event they chose union representation; and promising an improved grievance procedure as an inducement to employees not to engage in union activity (R. 41-42, 18-26). The Board’s order requires

the Company to cease and desist from the unfair labor practices found and to post the customary notice (R. 42-43, 26-28).

ARGUMENT

I.

SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT

A. Coercive interrogation and threats to impose more onerous working standards

In the week preceding the election of February 4, employee Carol Alvarado was twice called to the desk of her departmental supervisor, Nicola Krest, and questioned as to the reasons for her union activities.⁵ Alvarado replied that the employees could use a better vacation plan, sick leave and higher wages. Responding, Krest stated “these things were all impossible to get,” indeed, the employees were “well off” under existing conditions and that he had never complained about their work standards, tardiness, or use of the bathroom for a cigarette (Tr. 27). Krest then made it clear that all this would change “if the Union came in,” that work standards would be set and if the employees failed to meet them they “would be out” (*ibid.*). Krest further warned that continued tardiness would result in discharge of the offending employee. The law is well settled that such interrogation of employees concerning union activities, when coupled, as it was here, with threats to impose more onerous work standards and plant rules in the event the employees should select a union as their collective-bargaining representative violates Section 8(a)(1) of the Act. While

⁵Significantly, Alvarado was the only employee in her department to wear a button publicizing her allegiance to the Union (*supra*, p. 3).

the enactment or promulgation of stricter work standards and rules of plant discipline is ordinarily within management's control, the threat to impose such standards if the employees should choose the union is proscribed by the Act. *N.L.R.B. v. Victory Plating Works, Inc.*, 325 F.2d 92, 93 (C.A. 9); *N.L.R.B. v. Plaskolite, Inc.*, 309 F.2d 788, 789 (C.A. 6); *N.L.R.B. v. Swan Fastener Corp.*, 199 F.2d 935, 937-939 (C.A. 1); and see *Bon Hennings Logging Co. v. N.L.R.B.*, 308 F.2d 548, 552-553 (C.A. 9); *N.L.R.B. v. McCatron*, 216 F.2d 212, 215-216 (C.A. 9), cert. denied, 348 U.S. 943.

B. Threats of reprisal: the February 2 captive audience speeches

In seeking to thwart the threatened advent of the Union, the Company relied heavily on an extensive anti-union propaganda campaign, a campaign which culminated with a series of captive audience speeches delivered by the Company's Vice President for Industrial Relations, Robert Hennemuth, ten days before the election.⁶ Relying on the credited testimony of various employees and transcriptions made from the tape recordings of the various speeches (R. Exh. 3-9), the Board concluded that these speeches

⁶In the earlier stages of this campaign the employees received various letters from the Company designed to persuade the employees to reject the Union (see e.g., G.C. Exh. 4-13). Thus, on December 10, 1964, the employees were told that a union would cost them \$50,000 out of their pockets but would not "provide a single bit of business to sustain employment" (G.C. Exh. 4). At other times, the employees were told of strikes that had occurred at other companies when negotiations with the same union had broken down (G.C. Exh. 6-7), and that "[w]hen you come right down to it, a union can't do anything for you . . . but it can do something *TO* you. . . . Only you and your company can provide [higher wages or fringe benefits]. A Union May Make A Lot Of Promises, But A Company Must Make All The Decisions, Except One. That one is the union's *decision to strike* in the event they cannot fulfill their wild campaign promises through negotiations" (Emphasis in original) (G.C. Exh. 10).

constituted “poorly concealed threats to deprive respondent’s employees of any and all benefits to be derived from the exercise of the right to collective bargaining through representatives of their own choosing” (R. 23). Before the Board, the Company did not dispute the facts as found by the Board, but rather contended that the speeches were protected by Section 8(c) of the act, as expressions of the Company’s “views, arguments or opinion” about the consequences and desirability of unionism.⁷ The Board rejected this contention, because Section 8(c) expressly excludes “threat[s] of reprisal or force or promise of benefit.” It is submitted, as we now show, that the Board’s determination is amply supported by the record, and under the applicable standards of review is entitled to affirmance by this Court.

In determining the propriety of preelection speeches and whether Section 8(a)(1) of the Act has been violated, the law is clear that the “function of drawing the rather nebulous line between permissible persuasion and prohibited coercive conduct lies within the special competence of the Board. . . .” *N.L.R.B. v. Brown-Dunkin Co.*, 287 F.2d 17, 18 (C.A. 10). Accord: *Daniel Construction Co. v. N.L.R.B.*, 341 F.2d 805, 811 (C.A. 4), cert. denied, 382 U.S. 831; *Surprenant Mfg. Co. v. N.L.R.B.*, 341 F.2d 756, 760 (C.A. 6); see also *N.L.R.B. v. McCatron*, 216 F.2d 212, 216 (C.A. 9), cert. denied, 348 U.S. 943. Furthermore, “in considering whether such statements or expressions are protected by Section 8(c) of the Act, they cannot be considered as isolated words cut off from the relevant circumstances and background in which they are spoken.” *N.L.R.B. v. Wagner*

⁷Section 8(c) provides that: “The expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.”

Iron Works, 220 F.2d 126, 139 (C.A. 7), cert. denied, 350 U.S. 981. Accord: *N.L.R.B. v. Globe Wireless, Ltd.*, 193 F.2d 748, 751-752 (C.A. 9). As Judge Learned Hand observed in *N.L.R.B. v. The Federbush Co.*, 121 F.2d 954, 957 (C.A. 2):

Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation of the speaker and the hearer is perhaps the most important part. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart. The Board must decide how far the second aspect obliterates the first.

As set forth in the Statement, Robert Hennemuth made a series of eight captive audience speeches on February 2.⁸ To indicate the official nature of his visit, Hennemuth told the employees that the Company's chairman of the Board and the President had decided that he should "go ahead out and please have a chat with the employees who are going to be voting" (R. Exh. 3, p. 1).⁹ Hennemuth also told the employees that his job with the Company was to handle labor relations, to deal with "labor union kinds of problems" (R. Exh. 3, p. 2).

Throughout the February 2 speeches, Hennemuth reminded the employees that if they voted to be represented by a union, a period of nego-

⁸Substantial portions of seven of the speeches and the ensuing question and answer period are reproduced as Respondent's Exhibits 3-9. The eighth speech, delivered to handicapped workers (deaf mutes) was not recorded (Tr. 244). Portions of the first, second, third, fourth, and seventh speeches were not recorded in their entirety as the tape recorder was not turned on at the beginning or ran out before the end of the speech (R. 20; Tr. 245-246).

⁹The Company's headquarters are located in Lexington, Massachusetts.

tiations would then ensue. In these negotiations “legally the Company and the Union start from scratch . . . just as though nothing’s on the table . . . they (the Union) have to get up to where you are—where the Company is first—before you even get any more.” As a result, “the whole wage policy and program . . . would be open to negotiations if a union, perish the thought, did come in” (Resp. Exh. 8, p. 14; Tr. 48, 79, 109, 131, 142, 170). For example, Hennemuth pointed out, the employees’ insurance was now paid for by the Company, but “if the Union should come in, that this would have to be negotiated and that we (the employees) might possibly end up having to pay for what we were now getting free” (Tr. 31, 79-80, 142). Emphasizing the point that a loss of benefits might result if the employees selected a union to represent them, Hennemuth related the story of a company which had given bus fares to its employees but “when the union did come into the plant, the company took away the bus fare” (Tr. 79-80).

In sum, Hennemuth, speaking for the Company, clearly conveyed the message that in the event the employees chose the Union, then they would run a substantial risk of losing some of their existing fringe benefits in the ensuing negotiations. The threat of this loss was not related to any financial or economic predicament that the Company might be experiencing, but rather the determinative factor would be the existence of the Union as the employees’ collective-bargaining representative. Only if the Union was present would the employees be subjected to the risk of a loss of their existing fringe benefits. It is submitted that the coercive nature of the foregoing statements is clear and that the Board was fully warranted in finding that they violated Section 8(a)(1) of the Act. *Surprenant Mfg. Co. v. N.L.R.B.*, 341 F.2d 756, 761 (C.A. 6); and see *N.L.R.B. v. Marsh Super-*

markets, Inc., 327 F.2d 109, 111 (C.A. 7), cert. denied, 377 U.S. 944. Accord: *Federal Envelope Co.*, 147 NLRB 1030, 1040; *Stuttgart Shoe Corp.*, 149 NLRB 663, 669.¹⁰

In concluding that Hennemuth's speeches overstepped the "rather nebulous line between permissible persuasion and prohibited coercive conduct," *N.L.R.B. v. Brown-Dunkin Co.*, *supra*, 287 F.2d at 18, the Board was fully cognizant that Section 8(c) of the Act protects "the expressing of any views, argument or opinion . . . [so long as] such expression contains no threat of reprisal or force or promise of benefit." Before the Board, the Company contended that since its statements were carefully couched in terms of predictions as to the possible economic consequences which would result if the Union were selected by the employees, they cannot be found to constitute a "threat of reprisal" and, therefore, Section 8(c) of the Act applies. It is submitted, however, that the existence of a threat of reprisal cannot depend solely on whether the employer was subtle enough to use words of probability or possibility rather than of certainty. A statement that an employer may take certain action which would affect the economic well being of his employees may still constitute a threat. Indeed, an employee, unsure of the consequences of a vote for

¹⁰In the course of his speeches, Hennemuth also promised the employees an improved grievance procedure. Henceforth, the employees, if dissatisfied with the resolution of grievances at the plant level, could appeal directly to Hennemuth or the Company's Industrial Relations Department. Such change in procedure clearly constituted a benefit to those employees who felt that their complaints were not being given adequate attention, and, we submit, violated Section 8(a)(1) of the Act. "[I]nterference accomplished by allurements are as much condemned by the Act as is coercion." *N.L.R.B. v. Douglas & Lomason Co.*, 333 F.2d 510, 514 (C.A. 8). See also, *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 409-410; *S & H Grossinger's, Inc.*, 156 NLRB 233, 234, enforced 372 F.2d 26 (C.A. 2).

the Union, would be most reluctant to run the risk that his employer was only bluffing.¹¹

For these reasons, the law has developed that "an employer's prediction of untoward economic events may constitute an illegal threat if he has it within his power to make the prediction come true." *International Union of Electrical, Radio & Machine Workers, AFL-CIO v. N.L.R.B.*, 289 F.2d 757, 763 (C.A. D.C.). Or, as conversely stated, "In order not to be a threat, a prediction must relate to an event over which the speaker has no control." *N.L.R.B. v. Teamsters, Chauffeurs, Warehousemen and Helpers Local 901*, 314 F.2d 792, 794 (C.A. 1). Accord: *N.L.R.B. v. Nabors*, 196 F.2d 272, 276 (C.A. 5), cert. denied, 344 U.S. 865; *N.L.R.B. v. Louisiana Mfg. Co.*, 374 F.2d 696, 702-703 (C.A. 8); cf. *N.L.R.B. v. Geigy Co.*, 211 F.2d 533, 557 (C.A. 9), cert. denied, 348 U.S. 821. In the instant case, there can be no doubt that the statements found by the Board to constitute threats, related to matters well within the Company's power to control. Thus, if the Union was selected by the employees and negotiations ensued, the Company in its position as a bargaining party could have insisted that all existing fringe benefits be renegotiated from scratch. Indeed, throughout the Hennemuth speeches, it was made trans-

¹¹The coercive impact of Hennemuth's February 2 speech is all the more destructive of the rights of employees because it was made by a high-ranking official flown in from Massachusetts for the express purpose of talking about unionization. This is particularly true when the employees are directed to assemble on company time and on company premises. See, staff of Subcomm. on National Labor Relations Board, House Comm. on Education and Labor, "Administration of the Labor-Management Relations Act by the N.L.R.B." p. 58 (87 Cong., 1st Sess., Comm. Print 1961); *N.L.R.B. v. United Aircraft Corp.*, 324 F.2d 128, 130 (C.A. 2), cert. denied, 376 U.S. 951; Note, 61 Yale L. J. 1066, 1074-1076 (1952); Note, 14 U. Chi. L. Rev. 104, 108-110 (1946); Bok, "The Regulation of Campaign Tactics in Representation Elections Under the N.L.R.A.," 78 Harv. L. Rev. 38, 100-103.

parently clear to the employees that the Company did have the power and ability to make its predictions come true. The employees were repeatedly told in no uncertain terms that if the Union wins, “a period of negotiations must follow after that point and there comes into being between the union and the company after that only what the company wants to agree to. . . .”¹² And in reference to the employees’ evident interest in paid sick leave, Hennemuth stated, “even if a union does come on these premises as a result of Thursday (election day), that does not mean any such union will get paid sick leave. And, I’m saying to you right now, it won’t” (R. 22; Resp. Exh. 9, p. 6; 3, p. 15; 4, p. 9; 6, p. 3; 8, p. 7). In sum, the Company’s predictions do not refer to untoward economic consequences which might result from decisions made by third parties. Rather, the power to transform the predictions into actualities was, as the Company was quick to point out, at all times within the control of the employer. The speeches clearly conveyed the message that a consequence of the selection of the Union would be the discontinuance of existing benefits and a “start from scratch,” the coercive nature of which was plain and, accordingly, in violation of Section 8(a)(1) of the Act. *Surprenant Manufacturing Co. v. N.L.R.B.*; 341 F.2d 756, 761 and cases cited *supra*, pp. 11-12. Moreover, although all employee benefits would have been subjected to good-faith bargaining if the Union had won the February 4 election, the Company was not justified in “making the anticipated events the subject of threats . . . to force the abandonment of the Union by the

¹²This same theme was advanced in earlier company propaganda leaflets: “No union can guarantee anything which a company is not willing or able to give” (G.C. Exh. 9), and, “no union could have obtained more for you than your company has already granted voluntarily, *and the same holds true for the future*” (emphasis in original) (G.C. Exh. 11).

employees.” *N.L.R.B. v. Parma Water Lifter Co.*, 211 F.2d 258, 262 (C.A. 9), cert. denied, 348 U.S. 829; *N.L.R.B. v. Miller*, 341 F.2d 870, 872-873 (C.A. 2); *Daniel Construction Co. v. N.L.R.B.*, *supra*, 341 F.2d at 810-811; *Surprenant Mfg. Co. v. N.L.R.B.*, *supra*, 341 F.2d at 760-761.

Finally, it is anticipated that the Company will seek to rely on this Court’s recent decision in *N.L.R.B. v. TRW-Semiconductors, Inc.*, 385 F.2d 753. However, in *TRW*, the Company had stated that it would be necessary to “begin from scratch and bargain hard to protect our competitive position” *Id.* at 758. In contrast, here the Company never offered an economic justification for its asserted bargaining policy. Rather, the repeated statements by the Company as to its bargaining position were tied solely to the fact of union representation. Moreover, in contrast to *TRW*, the instant statements constantly stressed the power that the Company had to make its predictions come true.¹³ On the basis of the foregoing, we submit that *TRW* does not control the instant case.¹⁴

¹³The Company’s continuing emphasis on the “control” factor only served to sharpen the clarity of its threats. Moreover, in a situation such as that presented in *TRW* the employer may assert that it will have to bargain hard in order to protect its “competitive position” but the union can seek to allay fears of the employees by assuring them that while seeking improvements it will not force the company into insolvency. But here, the Company never advanced any basis for its statements (compare *International Union of Electrical, Radio & Machine Workers, AFL-CIO v. N.L.R.B.*, 289 F.2d 757, 763 (C.A. D.C.)), and the Union was, accordingly, unable to respond. From the employees’ point of view the Company’s statements were tied solely to the advent of the Union.

¹⁴In its answer to the petition for enforcement, the Company contends that these proceedings are now moot. But as the Supreme Court has pointed out, “. . . compliance with an order of the Board does not render the case moot, . . . A Board order imposes a continuing obligation, and the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree.” *N.L.R.B. v. Mexia Textile Mills*, 339 U.S. 563, 567; *N.L.R.B. v. Rippee*, 339 F.2d 315, 316 (C.A. 9).

II.

THE BOARD PROPERLY REFUSED, IN VIEW OF THE GENERAL COUNSEL'S OBJECTION, TO ALLOW THE CHARGING PARTY UNION TO EXPAND THE SCOPE OF THE LITIGATION BEFORE THE BOARD

During the hearing in this case, the Union filed a motion designed to expand the scope of the litigation before the Board by adding new unfair labor practice allegations to the General Counsel's complaint. Based upon the General Counsel's opposition, the Trial Examiner denied the motions and the Board affirmed. The Union alleges this as error because the Board, it claims, has discretion to allow amendments over the General Counsel's objection. But this Court has already considered and rejected such a contention: "... it is well established that the Board is not empowered to allow amendments to the complaint which the General Counsel has rejected. These are amendments proposed by other parties than the General Counsel and were it possible for them to impose amendments to the complaint, the final authority of the General Counsel to issue complaints would be circumvented. The authority to issue complaints is authority to determine what they shall contain." *Frito Co. v. N.L.R.B.*, 330 F.2d 458, 464.

The decisions of other courts are in accord with this view that the Board is without power to permit amendments to the complaint which the General Counsel has rejected. *Wellington Mill Division, West Point Mfg. Co. v. N.L.R.B.*, 330 F.2d 579, 590 (C.A. 4), cert. denied, 379 U.S. 882 ("the decision as to the *scope* of a complaint is for the General Counsel"); *International Union of Electrical, Radio & Machine Workers v. N.L.R.B.*, 289 F.2d 757, 762 ("the Board cannot entertain an amendment to the complaint which the general counsel opposes . . ."); *Piasecki Aircraft Corp.*

v. N.L.R.B., 280 F.2d 575, 588 (C.A. 3), cert. denied, 364 U.S. 933 (“the Board was within its province in according determination of the scope of the complaint to the General Counsel . . .”); *N.L.R.B. v. Bar-Brook Mfg. Co.*, 220 F.2d 832, 834 (C.A. 5) (“ . . . failure of the general counsel to process these complaints cannot be reviewed or set aside by the Board”).

On the strength of the foregoing alone, it would be appropriate, we submit, for the Court to reject the Union’s claim of error. However, in view of the Union’s lengthy argument that these cases rest on an erroneous interpretation of the Act and that more recent decisions require an alteration of settled law, we shall respond to these contentions.

The refusal by the Board to amend the complaint over the General Counsel’s objection rests, of course, upon the language and legislative history of Section 3(d) of the Act. That section provides that “the General Counsel of the Board . . . shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board. . . .” It is clear that Congress intended by this provision to effect a separation of the functions of prosecution and adjudication. As the courts have pointed out, the General Counsel was to investigate charges, issue complaints and prosecute them before the Board, much like a district attorney in criminal cases, without being subject to Board review in his performance of such prosecutory functions. The Board was only to decide cases and supervise elections. *International Union of Electrical, Radio & Machine Workers v. N.L.R.B.*, *supra*; *Haleston Drug Stores, Inc. v. N.L.R.B.*, 187 F.2d 418, 421 (C.A. 9), cert. denied,

342 U.S. 815, H. Conf. Rep. No. 510, on H.R. 3020, 80th Cong., 1st Sess., p. 37, I Leg. Hist. (1947), 541.¹⁵

In a long and unbroken line of decisions, this statutory provision has been interpreted to preclude Board and court review of the General Counsel's decision not to proceed on a charge of unfair labor practices.¹⁶ As the Supreme Court recently stated, "the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint." *Vaca v. Sipes, supra*, 386 U.S. at 182.

An amendment of a complaint at the instance of the charging party, therefore, without the consent of the General Counsel, would be wholly inconsistent with the statutory scheme. The General Counsel would hardly have final authority "in respect of the investigation of charges and issuance of complaints" if the charging party could request the Board to consider charges the General Counsel had rejected. Likewise, the General Counsel would hardly have final authority with respect to "the prosecution of . . . complaints before the Board" if the Board could direct that

¹⁵"Leg. Hist." refers to the two-volume publication, *Legislative History of the Labor Management Relations Act, 1947* (G.P.O., 1948).

¹⁶*Vaca v. Sipes*, 386 U.S. 171, 182; *Dunn v. Retail Clerks, Local 1529*, 307 F.2d 285 (C.A. 6); *Thompson Products, Inc. v. N.L.R.B.*, 133 F.2d 637, 639-640 (C.A. 6); *Balanyi v. Local 1031, I.B.E.W. & N.L.R.B.*, 374 F.2d 723 (C.A. 7); *United Electrical Contractor Ass'n v. Ordman*, 366 F.2d 776 (C.A. 2), cert. denied, 385 U.S. 1026; *Division 1267, Amalg, Ass'n, etc. v. Ordman*, 320 F.2d 729 (C.A.D.C.); *N.L.R.B. v. Lewis*, 310 F.2d 364, 366 (C.A. 7); *Retail Store Employees Union Local 954 v. Rothman*, 298 F.2d 330 (C.A.D.C.); *Bandlow v. Rothman*, 278 F.2d 866 (C.A.D.C.), cert. denied, 364 U.S. 909; *Contractors Ass'n of Philadelphia, et al. v. N.L.R.B.*, 295 F.2d 526 (C.A. 3), cert. denied, 369 U.S. 813; *Houriham v. N.L.R.B.*, 201 F.2d 187, 188 (C.A.D.C.), cert. denied, 345 U.S. 930; *General Drivers, etc. v. N.L.R.B.*, 179 F.2d 492, 494 (C.A. 10); *Lincourt v. N.L.R.B.*, 170 F.2d 306, 307 (C.A. 1); *Jacobsen v. N.L.R.B.*, 120 F.2d 96, 99-100 (C.A. 3).

complaints be expanded to include matters he has excluded. Indeed, if the Board were permitted to put into a complaint what the General Counsel would omit, the General Counsel's powers to frame a complaint would be nullified.

To avoid the force of this analysis, the Union attempts to distinguish between the *issuance* of complaints and the *amendment* of complaints. This choice of terminology cannot obfuscate the facts: what the Union seeks here is to compel Board consideration of a charge involving facts and issues not being prosecuted by the General Counsel. The Union concedes (Br. p. 11) that the General Counsel has "final authority over the issuance of complaints." It would make little sense, therefore, to allow a charging party to seek an addition to a complaint already issued when, admittedly, such additional matters could not be brought before the Board if they stood alone. The same considerations involved in the initial decision to issue a complaint are involved when the decision to expand its allegations are confronted: e.g., reliability of witnesses, applicability of legal precedent, possibilities of settlement, the importance of the challenged conduct, etc.

It is true, as the Union points out, that Congress did not amend Section 10(b) of the Act when it added Section 3(d) in 1947, and Section 10(b) does contain a provision which allows the Board to amend any complaint "in its discretion" at any time prior to the issuance of an order. According to the Union, this provision of Section 10(b) proves its case.

But the Union misreads Section 10(b) and this Court's decision in *Frito Co. v. N.L.R.B.*, *supra*. In *Frito*, this Court interpreted Section 10(b) as permitting the Board to amend the complaint to conform to

proof admitted without objection by the General Counsel (330 F.2d at 465). In such circumstances, as was pointed out, “[a] ruling by the Board adverse to the wishes of the General Counsel is not a review of a decision of the General Counsel. In the prosecution of the complaint he could have objected to the introduction of the evidence. He did not do so and he thereby consented to the introduction of the issue to which the evidence was addressed. The trial examiner and the Board were then free to consider the evidence and to exercise judicial discretion as to whether to permit amendment to conform to proof” (*ibid.*). But nothing in the Court’s decision supports the Union’s instant contention that the trial examiner or the Board may permit an amendment to the complaint over the objection of the General Counsel. Indeed, the Court stated that where the General Counsel did object, the Board was without power to amend the complaint (*id.* at 464).

Likewise, in *International Union of Electrical, Radio & Machine Workers v. N.L.R.B.*, *supra*, the Court of Appeals for the District of Columbia Circuit was faced with the contention that, despite the clear language of Section 3(d) granting final authority to the General Counsel, Section 10(b) permitted amendments. Consistent with the separation of functions intended by Congress, the court found, Sections 10(b) and 3(d) could be reconciled (289 F.2d at 761):

Section 10(b) may be read, for example, to empower the Board to disallow amendments to the complaint, requested or approved by the general counsel, in order to prevent surprise and prejudice to the charged party.

Nor is there anything in more recent decisions to warrant a departure from the rule long recognized by this and other courts.¹⁷ The Union reads *Int'l Union, United Auto Workers v. Scofield*, 382 U.S. 205, as a decision which undercuts the entire basis for the rule. But this reading will not withstand analysis. In *Scofield* (and its companion case, *Fafnir Bearing Co.*), the issue was "whether parties who are wholly successful in unfair labor practice proceedings before the National Labor Relations Board have a right to intervene in the Court of Appeals review proceedings." 382 U.S. at 207. Unlike the issue in the case at bar, where the Board's position rests upon the explicit terms of the Act, the question posed in *Scofield* was one as to which the Act was "silent." 382 U.S. at 209. Accordingly, in upholding a private party's right of intervention, the Supreme Court plainly intended no expansion of rights with respect to other problems to which Congress had already spoken.

Moreover, the criteria considered by the Supreme Court as relevant to resolving the intervention problem are, by and large, wholly irrelevant to any claim that a charging party may be entitled to enlarge Board litigation over the General Counsel's objection. Thus, the Supreme Court focussed upon the importance of avoiding duplication of judicial proceedings, "circuit shopping," and needless delay. And it explicitly acknowledged the difference between the considerations involved in determining a charging party's rights before the Board and the considerations described as dis-

¹⁷Overlooked in the Union's collection of recent cases is *United Steelworkers of America v. N.L.R.B.*, 393 F.2d 661 (C.A.D.C.). There, the court considered and rejected a contention identical to that urged here, stating that the union's "strained efforts to use *International Union, United Automobile, etc. Workers v. Scofield*, 382 U.S. 205, to indicate a trend away from the court's earlier holding are unpersuasive."

positive of the question of appellate intervention. 382 U.S. at 219, n. 15.

To be sure, the Supreme Court in *Scofield* did reject the Board's argument that a successful charging party is an inappropriate party in review proceedings because of the distinction between "public" and "private" interests. But the Supreme Court's rejection of this argument leaves the *Frito Co.* analysis intact. Rhetoric about public and private rights was not the basis for this decision. It was the decision of Congress to commit final discretion in prosecuting complaints to the General Counsel that required rejection of the union's argument in *Frito Co.* in 1964, and that same legislative determination remains viable and dispositive today.

Retail Clerks v. Food Employers Council, Inc., 351 F.2d 525 (C.A. 9), and *Leeds & Northrup Co. v. N.L.R.B.*, 357 F.2d 527 (C.A. 3), cited by the Union, are consistent with the Board's views here. In *Leeds & Northrup*, the court characterized the agency's decision to accept a settlement of an outstanding complaint as an act of adjudication, not prosecution, and thereby subject to review as final Board action. *Retail Clerks* similarly rests upon a determination that matters had passed the prosecuting stage and were therefore subject to determination by the adjudicating body—in that case, the district court under Section 10(1) of the Act. In the case at bar, the Union has failed to explain how allowing the complaint amendments it seeks can be viewed as anything but a reversal of the General Counsel's exercise of authority over the scope of the complaint. This, if anything, must be within the prosecutor's domain.

CONCLUSION

For the reasons stated above, we respectfully submit that a decree should issue granting enforcement of the Board's order in No. 22,572, and denying the Union's petition for review in No. 22,572A.

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July 1968.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * *

BRIEF FOR INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS, AFL-CIO

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,572

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

RAYTHEON COMPANY

Respondent

No. 22,572A

INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS, AFL-CIO

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

ON PETITION TO REVIEW AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR INTERNATIONAL UNION OF ELECTRICAL,
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ON PETITION TO REVIEW AN ORDER OF
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BRIEF FOR
INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS, AFL-CIO

JURISDICTIONAL STATEMENT

These cases arise from a Decision and Order of the National Labor Relations Board issued against the respondent-employer [Raytheon Company] on October 5, 1966. The Board's Decision and Order are reported at 160 NLRB No. 122.

Appeal No. 22,572 is before the Court upon petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq.) for enforcement of its order. Appeal No. 22,572A is before the Court upon petition of the International Union of Electrical, Radio and Machine Workers, AFL-CIO (herein "IUE"), the charging party, to review and modify the Board's order insofar as it denies certain relief requested by the IUE. The two cases above have been consolidated.

This Court has jurisdiction of the proceeding under Section 10(e) and (f) of the Act, the unfair practices having occurred in the Northern California area.

Statement of the Case

This brief addresses itself to only a limited part of the consolidated cases, namely the failure of the Trial Examiner to consider

motion of the charging party to amend the complaint so that additional Section 8(a)(1) violations may have been found by the Board. These violations were presented as election objections in Case No. 20-RC-6201 and the Board found, on the basis thereof, that a free and fair election had not been held and directed a second election in Case No. 20-RC-6201. The charge case [which is the subject of this appeal] and the election case were consolidated for the purposes of hearing and their respective determinations are part of the same decision designated as 160 NLRB No. 12.

The issue in the unfair labor practice proceeding was whether certain employee interrogation, coupled with anti-union speeches made by the employer during the course of an election campaign, violated Section 8(a)(1) of the Act.

The issue in the election objection hearing was precisely the same except that the captive audience atmosphere of the speeches was considered in relation to the employer's restrictive rule on solicitation [alleged as an amendment to the unfair labor practice complaint] which was found to have "effectively foreclosed the [IUE] from presenting its claims and arguments to employees while they were on company premises" (R.24). On the basis of the employer's restrictive rule on solicitation, the interference violative of Section 8(a)(1) of the Act, the election was set aside (R.24-25).

Allegations concerning the employer's restrictive rule on solicitation [as well as certain other 8(a)(1) conduct] were offered as an amendment to the complaint (Pet. Ex.6). The amendment was opposed by the General Counsel and the Trial Examiner ruled: "I can't let you put in something that isn't alleged." (Tr.185). The IUE accepted to the denial of its motion to amend the complaint, but the board, sub silentio, affirmed its Trial Examiner's ruling.

We do not seek to duplicate the Board's brief in the enforcement proceeding covering the unfair labor practices found, which will include a discussion of extensive 8(a)(1) violations which occurred during and as a result of IUE organizational campaign to secure representation rights for the employees. We are confident that the Board's brief will review the evidence in detail and will show that its unfair labor practice findings are overwhelmingly supported by the evidence. We do not wish to burden the Court by traversing the same ground twice, and we therefore refer the Court to the Board's brief for a full statement of that phase of the case.

Specification of Error

In that the complaint [20-CA-3554] and election objections proceedings [20-RC-6201] were consolidated and the several matters in which were determined to and did constitute a single overall controversy (18, 25, [n.6]) it was error for the Trial Examiner to exclude the

consideration of any amendment to the complaint, except those proffered to the General Counsel. The rejection of the amendment was on the basis that its grant was not within the adjudicatory power exercised by the General Examiner.

The motion to amend the complaint that was made by the moving party stated:

- "(1) On or about December 1, 1964, and at all times since that date the Employer has maintained a rule, re-promulgated on or about September 29, 1965, which provides disciplinary action for employees who engage in: 'selling, soliciting, canvassing or distributing without prior management approval.'
- "(2) On or about March 1, 1965, the Employer gave benefits to its employees, specifically responding to individual grievances, as a reward for the employees voting against union representation on February 4, 1965, and in order to discourage further union activity and support.
- "(3) On or about November 30, 1964, the Employer, by and through its supervisor Blackburn, threatened employees with strict enforcement of rules regarding absenteeism and with discharge because of their union activity and in order to discourage union activity.
- "(4) On or about December 3, 1964, the Employer, by and through its supervisor Blackburn, threatened employees with strict enforcement of rules regarding absenteeism and with discharge because of their union activity and in order to discourage union activity.
- "(5) On or about December 3, 1964, the Employer by and through its supervisor Tom Burke, threatened employees with the strict enforcement of work rules and work standards because of their union activity and in order to discourage union activity.

"(6) On or about December 3, 1964, the Employer, by and through its supervisor Tom Burke, threatened employees with strict enforcement of work rules and limited break periods because of their union activity and in order to discourage union activity.

"(7) On February 2, 1965, the Employer held captive audience meetings for its employees and denied the Union's request to attend and participate in such meetings." (IUE Ex.6).

It was error to deny the charging party's motion which would allowed an adjudication of the foregoing conduct as a violation of on 8(a)(1), as well as conduct warranting the invalidation of the ion.

Summary of Argument

The Board's view that it lacks the power to amend complaints e request of a charging party is contrary to the express amendatory s of Section 10(b) of the Act in the exercise of its adjudicatory ion.

The Supreme Court in UAW v. Scofield, 382 U.S. 205, exploded board's theory that only the general counsel represents and enforces public interest in the prosecution of an unfair labor practice case. nition in Scofield of the public interest represented by a charging extends to his participation in an unfair labor practice proceeding, ling the right to offer an amendment to the complaint. The denial ant of such amendment falls within the adjudicatory power and tion of the Board and its trial examiner.

Section 3(d) of the Act results in a grant to the general counsel of exclusive power over a complaint with respect to its issuance and up to the time the hearing commences. Section 10(b) allows amendment by the Board "at any time prior to the issuance of an order." The legislative history of the 1947 amendments to the Act is in accord with the view that Section 3(d) did not alter the Board's amendatory powers as defined by Section 10(b).

The power to amend in order to conform with the proofs as established by this Court's decision in Frito Company, Western Division v. L.R.B., 330 F.2d 458 is no different than the power to consider amendments during hearing. Both fall within the adjudicatory process exercised by the Board and its Trial Examiner. Otherwise, the refusal of the general counsel to amend the complaint will usurp the Board's responsibility and function under the Act.

Post Scofield decisions (e.g., Leeds v. Northrup Company v. L.R.B., 357 F.2d 527 (3 Cir.) and Retail Clerks' Union v. Food Employers Inc., Inc., 351 F.2d 525 (9.Cir.)) have recognized the public interest exercised by a charging party with respect to Section 10(1) injunction proceedings, the settlement of unfair labor practice cases and in backpay proceedings. Equal recognition should be accorded a charging party who participates on the side of the general counsel in the prosecution of an unfair labor practice case.

Argument

I.

The Board Has The Authority To Amend Complaints At The Request Of A Charging Party.

We believe the Board's decision that it lacks the power to complaints at the request of the charging party is legally erroneous that it disregards the express language of Section 10(b) of the

"Any...complaint may be amended by the member, agent or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon." (Emphasis supplied)

The Union's motion was denied by the Trial Examiner on the that the Board was not empowered to amend a complaint over the ions of the general counsel (Tr. 185). The Union excepted to the of its motion but the Board, sub silentio, affirmed it. Since ard has not passed upon the merits of the Union's motion, denying ely on its assumed lack of power, this portion of the case must be ^{1/}ed to the Board.

The above-quoted grant to the Board of power to amend

B. v. Metropolitan Life Insurance Company, 380 U.S. 438, 442-443;
B. v. Don Juan, 178 F.2d 625, 627-628 (C.A.2); Retail Store Employees Local 400 v. N.L.R.B., 360 F.2d 494, 496 (C.A.D.C.)

complaints prior to the issuance of an order (Section 10(b) of the
29 U.S.C. §160(b)) was part of the original Wagner Act of 1935
and has remained unchanged ever since. The Board and its Trial
Examiner have erroneously concluded that the subsequent enactment in
Section 3(d), 29 U.S.C. §153(d), deprived them of the power
previously possessed [by an agent...or by the Board] to amend complaints
at the request of the charging party. Dallas Concrete Company, 102
NLRB 1292, 1296-7, enforced on other grounds 212 F.2d 298 (C.A.5);
Am Plastics Corporation, 144 NLRB 1010, 1011 (n.1); Sailors' Union
of the Pacific, 192 NLRB 547. In the last named case (192 NLRB 547, n1)
the Board expressed the basis for its conclusion, as follows:

"Section 8(a) and (b) of the Labor Management Relations
Act creates public and not private rights (Phelps Dodge
Corporation v. N.L.R.B., 313 U.S. 177). The protection
of those rights is entrusted to public officials and not
to private parties. The General Counsel of the Board has
'final authority, on behalf of the Board, in respect of
the investigation of charges and issuance of complaints
under Section 10, and in respect of the prosecution of
such complaints before the Board....' Thus, the decision
whether to issue a complaint, the contents of the complaint,
and the management of the prosecution before the Board is
entrusted to the sole discretion of the General Counsel.
(See Haleston Drug Stores, Inc., 86 NLRB 1166). It follows
that only the General Counsel may move to amend a complaint
to allege an additional violation of the Act. Otherwise
the management of the cause would pro tanto be taken from
the General Counsel and entrusted to a private party, which
is contrary to the scheme of the statute and the specific
provisions of Section 3(d). As the General Counsel has
declined to join in the charging party's motion, it is
hereby denied. The similar ruling of the Trial Examiner
is also affirmed."

Section 3(d) of the 1947 Act concerns itself with the subject of complaints as follows:

"There shall be a General Counsel of the Board... [h]e shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law."

The Board's misreading of the statute is premised upon its conception that only the general counsel represents and enforces the public interest in the prosecution of an unfair labor practice case. Relying upon this premise the Board then postulates that only the general counsel--not private litigants--can seek amendments. (See Mariners' Union of the Pacific, supra).

In 1965, the Supreme Court exploded the Board's theory that the Act creates only public rights (U.A.W. v. Scofield, 382 U.S. 205). In Scofield, the Court considered the scope of Section 10 of the Act and particularly whether a charging party has the right, in the public interest, to intervene in support of a Board decision challenged in a writ of appeals. The Board contended that the Act creates "no private rights" for a charging party to actively protect. The Supreme Court held that the Act recognizes the existence of such rights within the statutory scheme, as follows:

"On the other hand, the Board reasons, the charging party stands only to become a beneficiary of an order entered. As such he is but another member of the public whose interests the Board is designed to serve. The Labor Board is said to be the custodian of the 'public interest' to the exclusion of the so-called 'private interests' at stake. Support for this view is claimed to be found in our decision in Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 60 S.Ct. 561 84 L.Ed. 738 (1940). Also, the Board fears that enabling the intervenor to petition for certiorari from an adverse circuit decision will be inimical to the public interest. We disagree. In prior decisions, this Court has observed that the Labor Act recognizes the existence of private rights within the statutory scheme. [Footnote omitted]. These cases have, to be sure, emphasized the 'public interest' factor. To employ the rhetoric of 'public interest', however, is not to imply that the public right excludes recognition of parochial private interests.

"The statutory machinery begins with the filing of an unfair labor practice charge by a private person, §10(b) 61 Stat. 146; see also, 24 Fed. Reg. 9102 (1959), 29 CFR §102.9 (1965). When the General Counsel issues a complaint and the proceeding reaches the adjudicative stage, the course the hearing will take is in the agency's control, but the charging party is accorded formal recognition: He participates in the hearing as a 'party'; he may call witnesses and cross-examine others, may file exceptions to any order of the trial examiner, and may file a petition for reconsideration to a Board order, 28 Fed. Reg. 7973 (1963), as amended, 29 CFR §102.46 (1965). Of course, if the Board dismisses the complaint, he can obtain a review as a person aggrieved, which serves the 'public interest' that the Board interpretation of the relevant provisions accords with the intent of Congress."

It is submitted that with Scofield the entire predicate of Board's denial of power to amend complaints at the request of a charging party crumbles. In this case, the denial of the amendments

if the complaint was on the ground that the charging party has no standing--not on the ground that the amendments were not in the public interest. Since the amendment would have required the Company to remedy additional unfair labor practices, it could only have been found that the grant of the amendments would have served the objectives of the Act. The invalidation of the election may not be deemed a remedy since the Company was not thereby restrained from continuing its restrictive no-solicitation rule and from engaging in other unfair labor practices to which the amendment was addressed.

It remains true that only the general counsel may issue complaints for Section 3(d) so commands. But once a complaint is issued and the adjudicatory machinery set in motion, the question of how to proceed is one with respect to which the charging party has a role and the only objective that such participation may serve is in the public interest.

The purpose of Section 3(d) was to establish the role of the general counsel vis-a-vis the Board, which had previously been both prosecutor and judge. The prosecutorial role was taken from the Board and assigned to an "independent" general counsel. The charging party's role in the prosecution of the charge remained unaffected. This trinity of roles was recognized by this Court in Frito Company, Western Division N.L.R.B., 330 F.2d 458, as follows:

"It is now settled that the General Counsel's decision to investigate a charge or issue a complaint is unreviewable by the Board. However, once the decision has been made to issue a complaint and to prosecute it, the General Counsel has embarked upon the judicial process which is reserved to the Board. If the General Counsel can control this process, then the General Counsel can indeed usurp the Board's responsibility for establishing policy under the Act by simply withholding from the Board any issue which might precipitate a meaningful policy decision not in accord with the views of the General Counsel." (330 F.2d at 463-464)

In this case the judicial process reserved to the Board has been deemed to exclude the power to amend complaints unless requested by the general counsel. Only Congress can divest the Board of such power which would as of necessity require an amendment of Section (b) of the Act. In Frito, this Court pointed out:

"Authority for the Board to consider those clauses is said by petitioner to be the Board's amendatory power as set forth in Section 10(b) of the Act which provides in pertinent part:

'***Any such complaint may be amended by the member, agent or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.
***'

"Section 10(b) remained a part of the Act when the function of the Board was changed by the enactment of Section 3(d) of the Act.

"In N.L.R.B. v. Sterling Furniture Co., 202 F.2d 41 (9 Cir., 1953) this Court in response to the argument of the Board that an order could not be issued against any association which had voluntarily appeared, but had not by amendment of the complaint been made a party, stated that the Board's position was not based

upon consideration having to do with vindication of the policy of the Act, but on assumed procedural difficulties which had no merit in light of the Board's amended powers. Such being the case, the Court held that the Board had a duty to amend where the policy of the Act would be effectuated and a full disposition of the cause was not otherwise possible.

"The Board argues that the Sterling case, supra, is inapposite inasmuch as the General Counsel in that case approved the amendment of the complaint. There is, however, no reason to think the result would have been otherwise had the General Counsel not approved the amendment when consideration is given to the decision of this Court in Haleston Drug Stores, Inc. v. N.L.R.B., 187 F.2d 418 (9 Cir., 1957), cert. denied, 342 U.S. 815, 72 S.Ct. 29, 96 L.Ed. 616 (1951). In Haleston, the Board dismissed unfair labor practice complaints for policy reasons although the General Counsel had issued the complaints. This Court recognized that Section 3(d) of the Act conferred upon the General Counsel final authority to investigate charges, issue complaints and prosecute the same before the Board, but held that regardless of the position taken by the General Counsel, the Board still retained the power to dismiss on the grounds of effectuating the policy of the Act. (330 F.2d at 462-463).

The power to amend in order to conform with the proofs [as in to] is no different than the power to consider an amendment that was made during the course of the hearing. Both kinds of amendment within the adjudicatory process exercised by the Board and its Examiner. To make the amendment at hearing subject to the express approval of the general counsel would usurp the Board's responsibility in establishing policy by the simple expedient of withholding such approval.

In Frito the evidence of the violation was admitted into record and this Court thereupon held that "the Trial Examiner and the Board were then free to consider the evidence and to exercise special discretion as to whether to permit amendment to conform to the evidence" (330 F.2d 458). Since the holding in Frito is premised upon the Board's power under Section 10(b) of the Act it may not be limited to those situations where the amendment follows the admission of evidence or at times that the hearing has been completed. The amendatory power granted by Section 10(b) is "at any time prior to the issuance of an order based thereon [i.e., the underlying complaint]". It would be an anomalous result if the charging party's ability to secure amendment depended upon whether he was able to develop an evidentiary record during the course of the hearing. The express language of Section 10(b) does not warrant such a barrier since the Board's adjudicatory function in an unfair labor practice case begins upon the commencement of the hearing in which the charging union participates as a full party.^{2/} The discretion in the exercise of that adjudicatory function is the discretion-ower to allow amendments.

Section 102.8 of the Board's Rules and Regulations provides: "The term 'party' shall mean...any person filing a charge..." and Section 102.38 provides: "Any party shall have the right to appear in person, by counsel...to call, examine and cross examine witnesses, and to introduce into the hearing any documentary or other evidence, except that the participation of any expert witness shall be limited to the extent permitted by the trial examiner..."

CIO v. N.L.R.B., 289 F.2d 757 (C.A.D.C.) is based upon the mistaken conclusion that when Congress added Section 3(d) in 1947, its failure to add Section 10(b) was an inadvertence. An examination of the legislative history of the 1947 amendments shows that Section 3(d) was in no way intended as a limitation of the amendatory powers contained in Section 10(b).

In Senator Taft's analysis of Section 3(d), 2 Legislative ^{3/}History 1622, he stated:

"Section 3(d): In order to make an effective separation between the judicial and prosecuting functions of the Board and yet avoid the cumbersome device of establishing a new independent agency in the executive branch of the Government, the conferees created the office of general counsel of the Board, to be filled by appointment of the President, subject to Senate confirmation. We invested in this office final authority to issue complaints, prosecute them before the Board, and supervise the field investigating and trial personnel. It is asserted that this is inconsistent with the Administrative Procedure Act and that it places a tremendous amount of unreviewable power in the hands of a single official.

"The Board itself has been sensitive to the reproach that it acts as judge, jury, and prosecutor, and in recent years has promulgated regulations which have delegated the power of issuing complaints to the various regional directors."

, Senator Taft, the author of the 1947 Act, viewed Section 3(d) transferring the supervision of regional directors--who issued complaints--from the Board to the general counsel. But the power of amendment had never been delegated to regional directors and Senator Taft did not contemplate a transfer of that power.

In President Truman's veto message of H.R. 3020 (1 Leg. History 918) he pointed out the conflict that the amendments would create between the Board and its general counsel, as follows:

"...the general counsel would decide, without any right of appeal by employers and employees, whether charges were to be heard by the Board, and whether orders of the Board were to be referred to the Court for enforcement. By virtue of this unlimited authority, a single administrative official might usurp the Board's responsibility for establishing policy under the act."

The veto message which was intended as a "parade of horrors", did not state that the 1947 Act abrogated the Board's amendatory powers. In analyzing the conflict that would result between the Board and general counsel, it is unlikely that the veto message would have overlooked it.

In the dispositive Conference Report (1 Leg. History 505), Section 10(b) was restored to its original form which represents a separate act by the same conferees, who drafted Section 3(d). In these premises it cannot be assumed that Section 3(d), sub silentio, amended Section 10(b). Rather it is clear that Congress did not intend that Section 3(d) alter the Board's amendatory powers which were continued by the 1947 Act.

Since Scofield courts have acknowledged the expanded role of a charging party with respect to the settlement and prosecution of unfair labor practice cases. In Leeds & Northrup Company v. N.L.R.B., 357 F.2d 527 (3 Cir.), the court relied heavily upon the Scofield ruling [that the Act recognizes private rights within the statutory scheme] that it struck down the settlement of an unfair labor practice case when the charging party objected thereto. In acknowledging the status of a charging party, once a complaint had issued, the court said:

"While we are mindful that the General Counsel, and his functionary agent, the Regional Director, acts 'independently of any direction, control or review by the Board' (H.Conf.Rep.No.510, 80th Cong., 1st Sess., p.37, 1947) such authority as is delegated by the Board, with legislative permission 29 U.S.C. 153 (b)(d), pertains to the investigation, issuance, and when so decided, prosecution of complaint. Such delegation cannot carry with it final authority over the ultimate disposition of complaints beneath the Board level. Final disposition of complaint was reposed by Congress in the Board itself. See: Section 3(d) of the Act, 29 U.S.C. §153(d)." (357 F.2d at 534).

The issue in Leeds & Northrup was substantially identical to that which was involved in that court's pre-Scofield denial of an appeal by a charging party from the denial of an evidentiary hearing (Insurance Workers v. N.L.R.B., 46 LRRM 2028 (3 Cir.) cert. den. 363 U.S.806. In ruling its earlier Insurance Workers case, the court pointed out the meaning of Section 3(d), as follows:

"Under the prosecutory phase of Section 3(d) of the Act, the delegation of discretion to issue or not issue a complaint of unfair labor practice is not improper. But once

issued, an adjudicatory phase of the administrative process arises necessitating appropriate avenues of review, both administrative and judicial. The Board, by its own regulations, designed to implement the Labor Management Relations Act, cannot thwart review of its actions, or those of its authorized agents." (357 F.2d at 535).

In this case, it can be equally said that upon the inception of the adjudicatory phase, the general counsel cannot thwart the Board's action to remedy unfair labor practice by withholding his consent to an appropriate amendment made during the course of the unfair labor practice hearing.

This Court, in Retail Clerks' Union v. Food Employers Council, 351 F.2d 525, subscribed to the Scofield principle of "allowing public interest to be represented by the 'private' charging party when the representative of the NLRB is either unable or unwilling to do so" (351 F.2d at 529, N.2). In Retail Clerks' it was held that the charging party could prosecute a Section 10(1) injunction, independent of the regional director who had changed his mind after he had instituted the proceeding. The seeking of injunctive relief by the director was considered analogous to the exclusive function of the general counsel to issue a complaint and this Court refused to limit the discretion of the district court since it would make its "action a mere rubber stamp of the Regional Director" (351 F.2d at 530). In the instant case if the regional examiner is deemed powerless to consider the amendment, the adjudicatory function for which he is responsible will have been improperly limited by the general counsel who opposed the amendment.

Recently, the Board significantly broadened the right of charging parties to raise issues in back pay proceedings over the objection of the general counsel. In Journeyman Plaster's Protective Association (John P. Phillips Plastering Co., Inc., & H.H. Phillips) 62 LRRM 1641 (13-CB-1235), the charging party sought to introduce evidence of losses in addition to those claimed by the general counsel. The Trial Examiner refused to receive such evidence stating the charging party "lacks the authority to amend the general counsel's theory of, or pleading by way of complaint and backpay specifications in an unfair labor practice case. These powers are vested by law exclusively in the General Counsel of the Board...It follows that since the General Counsel has elected to stand on his pleadings he cannot introduce unpounded issues[s] which may not be amended, revised, or impugned by the charging party]." In reversing its trial examiner the Board

"We do not agree with the above ruling of the Trial Examiner. We perceive no reason either in law or in equity why the Charging Party in this instance should not have the right to introduce evidence disputing the correctness of the General Counsel's backpay specifications and their underlying computations and assumptions, and furnishing the basis for an amendment of the specifications."

It is both ironic and inexplicable that the Board has expressly rejected, in the present case with respect to a backpay proceeding, the very position it still espouses with respect to the original proceeding.

CONCLUSION

It is respectfully requested that this Court remand this to the Board with direction that it recognize the public interest represented by a charging party who participates in the institution of an unfair labor practice case and further, that it allow the amendment of such charging party, within the adjudicatory functions that it exercises pursuant to the express legislative intent of Section 10(b) of the Act.

Respectfully submitted,

Irving Abramson
Ruth Weyand
Melvin Warshaw

CERTIFICATION

I certify that, in connection with the preparation of this document, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing document is in full compliance with those Rules.

Washington, D. C.

Melvin Warshaw

, 1968

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22,572

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

RAYTHEON COMPANY, Respondent

No. 22,572A

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE
WORKERS, AFL-CIO, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

and

RAYTHEON COMPANY, Intervenor

On Petition for Enforcement and Petition To Review
an Order of the National Labor Relations Board

PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR
REHEARING AND SUGGESTION OF THE APPROPRIATENESS
FOR REHEARING *EN BANC*

FILED

MAR 21 1969

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On Petition for Enforcement and Petition To Review
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**PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR
REHEARING AND SUGGESTION OF THE APPROPRIATENESS
FOR REHEARING *EN BANC***

The National Labor Relations Board respectfully petitions this Court to grant rehearing to reconsider a decision of a panel of the Court (Judges Chambers, Koelsch and Browning) entered herein on February 19, 1969, and also suggests the appropriateness of rehearing *en banc*. The Court, *per curiam*, granted the Company's motion to dismiss the petitions herein on the ground that the Board's order became moot when the Board certified the results of a representation election held subsequent to the events in the instant case.

The Board found that the Company, during the course of an election campaign, violated Section 8(a)(1) of the Act by coercively interrogating employees about their union activities, by threatening employees with loss of benefits in the event they chose union representation and by promising employees benefits for abstaining from union activity. Accordingly, in order to remedy these unfair labor practices and to bar their resumption, the Board ordered the Company to cease and desist from engaging in such conduct and to post the customary notice to that effect in its plant. Thereafter, the Board sought enforcement of that order from this Court, and the Union petitioned to review that order.

The Board respectfully submits that this Court's action in dismissing the petitions herein misconceives the function and purpose of a Board cease and desist order and is in direct conflict with applicable Supreme Court decisions.

Thus, it is settled law that "a Board order imposes a continuing obligation; and the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree." *N.L.R.B. v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950) and cases cited therein, n. 4, acknowledging the unanimity of the Circuit Courts in support of this view. It is equally well-settled that an order of the Board, "lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made". *N.L.R.B. v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 271 (1938). Accord: *N.L.R.B. v. Metalab-Labcraft*, 367 F.2d 471, 472-473 (C.A. 4, 1966); *N.L.R.B. v. Marsh Supermarkets, Inc.*, 327 F.2d 109, 111 (C.A. 7, 1963), cert. denied, 377 U.S. 944; *N.L.R.B. v. Clark Bros. Co.*, 163 F.2d

373, 375 (C.A. 2, 1947). See, also, *Wirtz v. Bottle Blowers Ass'n*, 389 U.S. 463, 475-476 (1968).¹

The decision in this case and in *General Engineering Inc. v. N.L.R.B.*, 311 F.2d 570 (C.A. 9, 1962)—on which the panel in this case relied—squarely conflict with *Mexia* and *Pennsylvania Greyhound*, *supra*. In the instant case, this Court found that Company abstinence from violations of the Act during the period preceding an election held subsequent to the Board's decision in the unfair labor practice proceeding, obviates the necessity for enforcement of the Board's order. Yet *Mexia* directly held that even *complete* abstinence from unfair labor practices after a Board order and *full* compliance with the order do not lessen the propriety of enforcing that order. 339 U.S. at 567. Thus, under the rationale of *Mexia*, even if the Company had fully complied with the cease and desist and notice posting provisions here, the Board's order would not be moot. See also *N.L.R.B. v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 225 (1949); *N.L.R.B. v. Trimfit of California, Inc.*, 211 F.2d 206, 208 (C.A. 9, 1954); *N.L.R.B. v. American Potash & Chemical Corp.*, 98 F.2d 488 (C.A. 9, 1938). *A fortiori*, the cessation of unfair labor practices for the comparatively short time of a preelection campaign should not bar enforcement of a Board order.

Similarly, in *Pennsylvania Greyhound*, *supra*, the Supreme Court enforced a Board cease and desist order barring the company from recog-

¹The Supreme Court's dictum in *N.L.R.B. v. Jones & Laughlin Steel Co.*, 331 U.S. 416, 428 (1947) to the effect that "where the [Board's] order obviously has become moot, the court can deny enforcement without further ado," does not speak to the contrary. For the question here is whether the Board's order is in fact moot where the Board seeks enforcement for the purposes of having "the resumption of the unfair practice barred by an enforcement decree". *N.L.R.B. v. Mexia Textile Mills*, *supra*, 339 U.S. at 567.

nizing a company union, where a subsequent Board election had already established another union as the recognized bargaining agent. Surely, if a Board order is appropriate to bar resumption of conduct where the illegally recognized union has been validly replaced by a certified union, an order is appropriate to bar resumption of conduct where the illegal acts (interference with employees' broad Section 7 rights) encompass a wider scope of conduct than that later refrained from (interference with a Board election).²

Moreover, other courts which have ruled on the issue of alleged mootness of a Board order have flatly rejected this Court's position in *General Engineering* as unpersuasive. *N.L.R.B. v. Metalab-Labcraft*, 367 F.2d 471, 472 (C.A. 4, 1966); *N.L.R.B. v. Marsh Supermarkets, Inc.*, 327 F.2d 109, 111 (C.A. 7, 1963), cert. denied 377 U.S. 944. As the Seventh Circuit stated, in a case identical to the one at bar, "if the Board's order is justified, it is entitled to have it enforced *as a means of insuring that in*

²Thus, the Board respectfully disagrees with the statement of the Court in *General Engineering* that the Board's finding was solely that the Company "interfered with the employees' right to freely select a bargaining representative in violation of Section 8(a)(1)". 311 F.2d at 572. There, as here, the Board did not merely find that the conduct interfered with the election, but found also that the employer's conduct, even absent the election, interfered with employees' protected rights. The question of whether conduct interferes with an election and whether it violates Section 8(a)(1) are, of course, entirely separate. As we noted in our opening brief (p. 2), the question of the effect of the conduct on the election is not at issue here and, in any event, it is clear that conduct which is an unfair labor practice does not necessarily interfere with an election, nor does conduct which requires setting aside an election necessarily constitute an unfair labor practice. See, e.g., *Foreman & Clark, Inc. v. N.L.R.B.*, 215 F.2d 396, 401, 408-409 (C.A. 9, 1954), cert. denied 348 U.S. 887; *N.L.R.B. v. Shirlington Supermarket, Inc.*, 224 F.2d 649, 652-653 (C.A. 4, 1955), cert. denied 350 U.S. 914; *N.L.R.B. v. Clearfield Cheese Co.*, 322 F.2d 89, 92-94 (C.A. 3, 1963); *Furr's Inc. v. N.L.R.B.*, 350 F.2d 84, 86 (C.A. 10, 1965); *N.L.R.B. v. Tennessee Packers, Inc.*, 379 F.2d 172, 181 (C.A. 6, 1967).

future elections the conduct may not be repeated” (emphasis added). *N.L.R.B. v. Marsh Supermarkets, Inc.*, *supra*, 327 F.2d at 111. Accord: *N.L.R.B. v. Clark Bros. Co.*, 163 F.2d 373, 375 (C.A. 2, 1947). See, also, *N.L.R.B. v. Rippee*, 339 F.2d 315, 316 (C.A. 9, 1964).

In short, the Board’s order here is not moot. This Court, by refusing to enforce that order, substitutes for the Board’s judgment that an order is necessary to bar resumption of future conduct, its own judgment that no such order is necessary. Yet it has long been settled that the fashioning of appropriate remedial orders is “peculiarly a matter for administrative competence” and that a Board order may not be disturbed “unless it can fairly be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 216 (1964). We submit that the cases cited above fully establish that an order barring resumption of unfair labor practices effectuates the policies of the Act. This Court should, therefore, determine the case on its merits and, if it finds that substantial evidence supports the Board’s order, it should enforce the Board’s remedial order to effectuate that purpose.

We respectfully request, therefore, that this Court reconsider its decision in this case and in *General Engineering* in light of the Supreme Court’s decisions in *Mexia* and *Pennsylvania Greyhound*, *supra*, and reject the contention that the change in circumstances here rendered the Board’s order moot.

CONCLUSION

For the foregoing reasons, the Board respectfully prays that this petition for rehearing be granted and that, after such rehearing, the Court withdraw its decision of February 19, 1969, and for the reasons stated herein and in the Board's initial brief to the Court, enter a new decision enforcing the Board's order in full. The Board also suggests that in view of the conflict between this Court and other courts, including the Supreme Court, a rehearing *en banc* is appropriate.

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March 1969.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

RAYTHEON COMPANY,

Respondent.

No. 22,572

MAR 28 1969

INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

RAYTHEON COMPANY,

Intervenor.

No. 22,572A

FILED

MAR 28 1969

U.S. CIR. CL. Bldg.

On Petition for Enforcement and Petition To Review
an Order of the National Labor Relations Board

PETITION OF THE INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS, AFL-CIO,
FOR RE-HEARING EN BANC

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FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,)
)
Petitioner,)
)
v.) No. 22,572
)
RAYTHEON COMPANY,)
)
Respondent.)

INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

RAYTHEON COMPANY,

Intervenor.

On Petition for Enforcement and Petition To Review
an Order of the National Labor Relations Board

PETITION OF THE INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS, AFL-CIO,
FOR RE-HEARING EN BANC

The International Union of Electrical Radio and Machine Workers, AFL-CIO (herein called "IUE") respectfully petitions this Court to reconsider a decision entered herein on February 19, 1969. On the authority of the General Engineering, Inc. v. NLRB, 311 F.2d 570 (9 Cir. 1962), this Court (Judges Chambers, Koelsch and Browning) granted, per curiam, the Company's motion to dismiss the proceeding on the ground that the Board's order remedying various Section 8(a)(1) violations had become moot because a representation election was subsequently conducted.

The failure of the IUE to be selected as the exclusive collective bargaining representative in the subsequent election has nothing whatsoever to do with the Section 7 rights of the employees which the Board's order seeks to protect. The decision in this case and in General Engineering, Inc. v. NLRB, supra, was based upon the fact that during the intervening representation election the Company did not violate Section 8(a)(1) of the Act and the election was certified as validly conducted.

The question of election interference^{1/} is and was not before the Court despite the Board's finding that such interference also constituted independent unfair labor practice violations. The control of employee representation election proceedings are matters intrusted by Congress to the Board alone and not to the Courts NLRB v. Waterman Steamship Corporation, 309 U.S. 206, 226, 60 S.Ct. 493, 503. Just as interference in such election matters would constitute error by this Court, consideration

1/ Election interference is a factor for the Board to consider within its wide area of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees. National Labor Relations Board v. A. J. Towers Co., 329 U.S. 324. Since election objections are considered in relation to the laboratory conditions that the Board requires for the conduct of a representation, that may not be equated with unfair labor practices even though the latter may or may not constitute the basis for invalidating an election. Foreman & Clark, Inc., 215 F.2d 396, 409 (C.A. 9, 1954) cert. denied 348 U.S. 887; NLRB v. Shirlington Supermarket, Inc., 224 F.2d 649, 652, 653 (C.A. 4, 1955), cert. denied 350 U.S. 914; General Shoe Corporation, 77 NLRB 124, 126, 127. It is the commission of unfair labor practices which is before the Court for review and not the propriety of the election that was conducted after the Board issued its remedial order with respect to said unfair labor practices. Conduct that interferes with an election is completely separate and independent from conduct that violates Section 8(a)(1) of the Act and it is only the latter which is before this Court.

of the subsequently held election was also error since it infringes upon the Board's exclusive authority over the timing of elections Furr's v. NLRB, 350 F.2d 84, 85-86, (C.A. 10, 1965), Surprenant Mfg. Co. v. Alpert, 318 F.2d 396, 399 (C.A. 1, 1963); Pacemaker Corp. v. N.L.R.B., 260 F.2d 880, 882 (C.A. 7, 1953).

It is the Board's settled policy not to conduct representation elections during the pendency of unfair labor practice cases (N.L.R.B. v. Trimfit of California, 311 F.2d 206, 209 (C.A. 9, 1954)) unless the union requests an early election and agrees not to protest on the basis of unremedied unfair labor practices (Section 11730.1 of the NLRB Field Manual, July 1967). As the perpetrator of the unfair labor practices the employer cannot compel the union to proceed with an early election by withdrawing its pending charge (NLRB v. Trimfit of California, supra). The mootness result in this case improperly subjects the union to an election as between having the unfair labor practices remedied and having an early determination of representatives. In addition, the mootness result interferes with the Board's discretion in fixing the time and date of an election.

Assuming arguendo that IUE's willingness to go ahead with the subsequent election may also be deemed an "agreement" to

withdraw its pending charges, it could not affect the right of the Board to have its order enforced. Section 10(a) of the Act^{2/} expressly prohibits "any agreement" from affecting the Board's power to prevent any person from engaging in any unfair labor practice. Cf. UAW v. Scofield, 382 U.S. 205 (1965). Contrary to the Board's judgment that an order is necessary to bar the resumption of conduct violative of the Act in future elections, this Court substituted its own judgment and dismissed the unfair labor practice on its finding that enforcement would not effectuate the policies of the Act. It is submitted that the Court's judgment is in direct conflict with the Supreme Court's mandate that the fashioning of appropriate remedial orders is "peculiarly a matter for administrative competence" and a Board order may not be disturbed "unless it can fairly be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the

^{2/} Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.

Act." Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 216 (1964).

In NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261, 55 S.Ct. 571, the Supreme Court enforced a Board cease and desist order barring the company from recognizing a company union, where a subsequent Board election had already established another union as the recognized bargaining agent. In response to the suggestion that the case had become moot because the illegally recognized union had been validly replaced by a certified union, the Court said:

" . . . an order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made." (303 U.S. at 576)

The dictum in N.L.R.B. v. Jones & Laughlin Steel Corp., 331 U.S. 416, which is the predicate for the mootness conclusion in General Engineering is not to the contrary for it is the Board's view that statutory policy will be served by the enforcement of the order to prevent the "resumption of the unfair practices barred by an enforcement decree." N.L.R.B. v. Mexia Textile Mills, 339 U.S. 563, 567.

Compliance by an employer with a decision of the Board does not justify a refusal to issue a decree of enforcement (NLRB v. Toledo Deck & Furniture Co., 158 F.2d 426 (C.A. 6, 1946)) and is no defense against the entry of a decree of enforcement (N.L.R.B. v. Heck's, 369 F.2d 370 (C.A. 6, 1966)). It is well settled that a Board order imposes a continuing obligation and that the Board is entitled to effectively bar the resumption of the unfair labor practices by an enforcement decree NLRB v. Mexia Textile Mills, Inc., 339 U.S. 563, 567 (1950); Cf. Wirtz v. Local 153, Glass Blowers Ass'n., 389 U.S. 470, 474-475, 88 S.Ct. 643, 649-650 (1968).

The IUE's commitment to serve as the bargaining representative of the Company's employees has not been affected by its election loss. Multiple election campaigns frequently precede the certification of a union as the exclusive bargaining representative and is more the rule than the exception. On this premise alone the Board's judgment that enforcement of its order is necessary to bar the repetition of the unlawful conduct in future elections is fully within the exercise of its administrative expertise and must be respected by this Court.

In our opening brief we pointed out that General Engineering Inc. v. NLRB, 311 F.2d 570 (C.A. 9, 1962), on which the panel in this case relied, is distinguishable since consideration was limited to whether the Board's order should be enforced because of the intervening election and not "as a means of insuring that in future elections the conduct may not be repeated" NLRB v. Marsh Supermarkets, Inc., 327 F.2d 109, 111 (C.A. 7, 1963) cert. denied 377 U.S. 944. The error in General Engineering is in equating conduct violative of Section 8(a)(1) as simply election interference depending upon whether or not a second election is held. The willingness of the Company not to interfere with its employees' Section 7 rights may not be deemed as evidence that the Company stands ready, able and willing to comply with the law in future elections. Even assuming that somehow the second election may be deemed substantial compliance with the Board's order, it would not thereby become moot since such a result is foreclosed by NLRB v. Mexia Textile Mills, 339 U.S. 563, 70 S.Ct. 833, where the Court said:

"* * * the employer's compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from

an appropriate court. * * * A Board order imposes a continuing obligation; and the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree. As the Court of Appeals for the Second Circuit remarked, 'no more is involved than whether what the law already condemned, the court shall forbid; and the fact that its judgment adds to existing sanctions that of punishment for contempt, is not a circumstance to which a court will ordinarily lend a friendly ear.' * * The Act does not require the Board to play hide-and-seek with those guilty of unfair labor practices." (pp. 567-568, 70 S.Ct. pp. 828-829.)

General Engineering, and the decision of the panel in this case, is also in direct conflict with this Circuit's decision in NLRB v. Rippee, 339 F.2d 315 (C.A. 9, 1964) which obeyed the decision in Mexia and Pennsylvania Greyhound, supra. See also NLRB v. Crompton Highland Mills, 337 U.S. 217, 225 (Note 7).

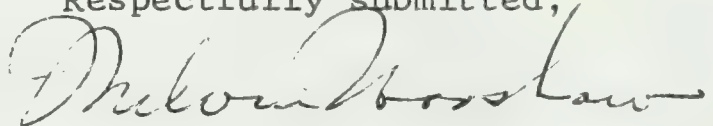
In every other Circuit that has had the occasion to consider the effect of an intervening election upon the Board's prior order that seeks to remedy unfair labor practice that occurred in an earlier election, the Board's order has been enforced and not found moot. NLRB v. Marsh Supermarket, Inc., supra, 327 F.2d at 111, which expressly disapproved General Engineering; NLRB v. Metalab - Labcraft, 367 F.2d 471, 472 (C.A. 4, 1966); NLRB v. Clark Bros. Co., 163 F.2d 373,

It is respectfully submitted that the Court's action in dismissing petitions herein is in direct conflict with applicable Supreme Court decisions and the powers of the Board as expressed in Section 10(a) of the Act. It is therefore requested that the Court reconsider its decision in this case and reject the contention that the intervening election has rendered the Board's order moot.

CONCLUSION

The IUE respectfully prays that this petition for re-hearing be granted and that, after such re-hearing, the Court withdraw its decision of February 19, 1969 and enter a new decision, on the merits, enforcing the Board's order in full and remanding the additional relief requested by the IUE to the Board for determination.

Respectfully submitted,



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Dated at Washington, D.C.

March 20, 1969.

No. 22,573 ✓

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MILLER REDWOOD COMPANY,
Respondent.

On Petition for Enforcement of an Order of
the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22,573

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MILLER REDWOOD COMPANY,
Respondent.

On Petition for Enforcement of an Order of
the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),¹ for enforcement of its order issued against respondent on May 5, 1967. The

¹ The pertinent provisions of the Act are reprinted in Appendix A, *infra*, pp. A1-A2.

Board's decision and order (R. 28-34, 13-23)² are reported at 164 NLRB No. 52. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in Crescent City, California, where respondent operates a lumber mill.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the respondent violated Section 8(a)(1) of the Act by interrogations, threats, promises, grants of benefits, and creating the impression of surveillance of employees' organizational activities. The Board also found that the respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Davis. The facts upon which the Board's findings are based are summarized below.

A. The advent of the Union; the Company's anti-union campaign begins

The Union's³ organizational activities among the Company's employees commenced in April 1965, with several union meetings being held and union cards passed out and signed (Tr. 9-10). On May 28,⁴ Darrell Schroeder, the General Manager at the mill operation, received a letter from the Union asserting majority status and requesting recognition

² References designated "R." are to Volume I of the record as reproduced, pursuant to Rule 10 of this Court. "Tr." refers to the portions of the stenographic transcript of the unfair labor practice hearing, reproduced pursuant to Court Rules 10 and 17. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. References designated "G.C. Exh." and "R. Exh." are to exhibits of the General Counsel and respondent respectively.

³ The United Brotherhood of Carpenters & Joiners of America, AFL-CIO.

⁴ All the events herein occurred in 1965.

(R. 14; Tr. 172, G.C. Exh. 3).⁵ That same day, in the presence of 4 or 5 of the employees, Schroeder declared that if he “found out who was starting it [the Union], they would be out” (R. 16; Tr. 89, 90, 92).

With the Union’s request at hand, the Company began to inquire about the Union and the employees’ interest therein. In early June, sawmill foreman Connor asked employee James Lynch whether he knew anything about the Union coming in. Lynch replied that he did not and that he did not care whether it came in or not. Connor responded, “Well, I care because I would probably lose my job.” (R. 16; Tr. 99). Connor then asked whether Lynch knew of “anyone else” trying to get the Union in, to which Lynch answered that he did not (*Ibid.*).

Subsequently, on June 11, Schroeder spoke with employee Leroy Roberts, a leadman on the green chain operation, and, in relation to the current union campaign, inquired of Roberts why the men were dissatisfied. When Roberts expressed ignorance, Schroeder asked further if there was any complaint about a health and welfare program. Roberts replied that he did not know, that he, himself, was satisfied. Schroeder then said that a new insurance plan, equal to any then in effect in the locality and to any offered by any union, along with a retirement program, would soon be explained to the men (R. 14; Tr. 175-177).

B. The Company attempts to influence union adherent Jerry Davis

Employee Jerry Davis was very active in behalf of the Union: he signed a union card, passed out cards to other employees and attended union meetings (R. 15; Tr. 9-11). At a social occasion on June 5, Davis discussed his interest in the Union with John Womack, who was not then employed by the Company (R. 15; Tr. 12-13). About a week later, Womack became a foreman at the Company’s mill (R. 15; Tr. 325, 329,

⁵ Schroeder testified that on the same day he telephoned Roy Glassow, a representative of an organization which represents and advises timber

175). In mid-June, while Davis was in Superintendent Eichar's office, Eichar asked him about the men signing union cards (R. 15; Tr. 13-14). Davis acknowledged his interest in the Union and stated that he felt that the Union "would give us a lot better health and welfare plan" (R. 15; Tr. 14). Eichar asserted that a union would interfere with Davis' promotions, and lessen his chances of becoming a foreman (R. 15; Tr. 14-15). Davis would have a better future "going with the Company [rather] than with the Union," said Eichar, "you won't have near the advancements if you vote the wrong way" (R. 15, 17; Tr. 16). Eichar then asked Davis if he would like to discuss the matter further with Schroeder, and Davis replied that he would, so that he could get both the company and the union sides of the story (R. 15; Tr. 16).

About a week later, Davis was called to Schroeder's office, at which time the Union was again discussed. Davis told Schroeder that some of the men felt that they had no job security; Schroeder, in response, assured Davis that his job was secure (R. 15; Tr. 17). When Davis alluded to the firing of several employees who had asked for a small pay increase, Schroeder suggested that "they didn't ask for it in the right way" — that they had "asked for a nickel raise or else" (R. 15; Tr. 17-18). Schroeder noted that "there are two sides to every story" (R. 15; Tr. 18).

Davis then raised the subject of vacations (*Ibid.*). The employees in the mill understood that they earned no vacation credits unless their period of employment extended from June 1 of one year through the following May 31, and in that 12 months they worked at least 1400 hours (R. 14; Tr. 18, 19-20, 317-318, 320). Davis had worked less than a year and had put in only 1355 hours (R. 15; Tr. 18). Now, however, Schroeder informed Davis that he and several other employees

(footnote 5 continued)

operators in labor matters, and that Glassow cautioned against supervisors mentioning the Union to the employees (R. 14; Tr. 173-174). A few days later, Schroeder instructed Superintendent Dale Eichar not to make threats about the Union, and on June 14, Glassow himself told the supervisors what they could and could not lawfully do in the presence of union organizing (R. 14; Tr. 175, 177-178, R. Exh. 3).

would soon be given a vacation allowance (*Ibid.*). When Davis inquired about the health and welfare plan, Schroeder said that he would have a man come to the mill to explain it to the employees (*Ibid.*).

Concluding the interview, Schroeder told Davis that he knew that about 13 of the men had been attending union meetings and that "I know who they are. I have the license numbers" of their cars (R. 15; Tr. 19).

Subsequently, Eichar asked Davis how his talk with Schroeder went, and inquired if Davis "had made up [his] mind how [he] was going to vote" (R. 15; Tr. 20-21). When Davis replied that he had not, Eichar quickly added, "I would advise you not to vote for the Union" (R. 15; Tr. 21).

In keeping with his promise, Schroeder granted vacation benefits on a pro rata basis to 11 employees, including Davis, who had not worked the requisite time for the regular, full vacation (R. 14; Tr. 178-180, R. Exh. 4). During the week of June 21, Schroeder, who had not previously discussed the new pro rata system with the employees, called each of the recipients individually to the office to inform him of his vacation credit (R. 14; Tr. 193-194).

C. Jerry Davis is discharged

Jerry Davis began his employment with the Company as a laborer in October 1964 (R. 14; Tr. 8). He progressed quickly within the Company: in November 1964 he was assigned as a "jump roll" operator at the same hourly rate of \$2.41; late in February he was moved to the "pony edger" and given an increase of 15¢ per hour; on March 1 he became the operator of the gang trim saw, with a further hourly increase of 20¢ to \$2.76 (R. 14; Tr. 8-9).⁶ Davis initially experienced

⁶ The function of the trim saw operator is to make a judgment, as the rough lumber moves along the belt approaching the saws, as to which of the boards are suitable for lumber, and then to trim such boards to optimum lengths. If a board coming to the saws is obviously unsuitable for manufacture into finished lumber because of rot or other serious defect,

some mechanical problems and, in accordance with company instructions to sound the mill whistle to signal the millwright or the electrician for aid, often signaled for help (R. 17; Tr. 204-205). Millwright Hartwig complained about this to Eichar and it soon ended (R. 17; Tr. 112, 204-205). In mid-May Davis' wage rose to \$2.91 and, a month later, as the result of a blanket wage rise, his rate became \$2.97 (R. 14-15; Tr. 8-9). Davis' supervisors considered him a capable worker. Eichar once commented that Davis was undertrimming but was doing it "about" right (R. 17; Tr. 22, 379). Connor had occasion to tell Davis that though he was new at the job, he was doing very well (R. 17; Tr. 23, 238).⁷

In early July, when the mill closed for a week, Davis asked to be included in a cleanup crew that was assigned to do some extra work (R. 15; Tr. 374). Eichar assented to the request, explaining that he was giving the vacation work to the "key men" (R. 15; Tr. 374-375). Davis worked only 2 days during the mill shut down and then took the 3 days vacation he had been granted by Schroeder (R. 19; Tr. 19-20, 45, 375-376). When Davis returned to work on July 12, Connor offered him the job as "gang edger," and Davis accepted (R. 19; Tr. 21). However, he was not immediately assigned to that position, and at the time of his discharge four days later, Davis was still operating the trim saw (R. 18; Tr. 8, 21).

On July 16, at the end of his shift, Davis was handed his check by Connor and told that he was being discharged (R. 18; Tr. 246). When Davis asked for a reason, Connor told

(footnote 6 continued)

the saws are dropped to allow the unsuitable boards, trimmed to worthless 2-foot lengths, to drop to a lower belt so that they do not proceed to the next finishing operation. (R. 17; Tr. 167-168.)

⁷ While in Schroeder's office in June, Davis commented that some of the men resented his being advanced so rapidly, but Schroeder assured him that "at [the] time [he was] the only qualified man . . . and the most eligible to receive it" (R. 15; Tr. 18-19).

him that he had been a “big problem” (R. 18; Tr. 250-251). Davis then asked Connor if Schroeder had fired him, and Connor replied, “I can’t commit myself, you talk too much on the job” (R. 18; Tr. 22).⁸ At the hearing, Connor asserted that Davis had been discharged because he had been observed deliberately “slashing” lumber (cutting all boards into two foot unusable lengths) (R. 18; Tr. 250-251). The Trial Examiner expressly discredited Connor’s and Millwright Hartwig’s testimony that they had watched Davis deliberately destroy some 6000 board feet of lumber (R. 18-19; Tr. 210-211, 249).

II. THE BOARD’S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board, in agreement with the Trial Examiner, found that the Company interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the Act by interrogation, threats, promises, the granting of benefits, and creating the impression of surveillance (R. 28). And disagreeing with the Examiner’s conclusion that the General Counsel had failed *prima facie* to establish that Davis was discharged because of his union activity, the Board found that the Company discharged Davis in violation of Section 8(a)(3) of the Act (R. 29-30).⁹

The Board’s order directs the Company to cease and desist from the unfair labor practices found, from discouraging

⁸ According to Schroeder, Connor told him that Davis was being fired for overtrimming, undertrimming and slashing (R. 18; Tr. 185-186).

⁹ The Board further found, in agreement with the Trial Examiner, that the discharge of Leroy Roberts did not violate the Act (R. 30).

membership in the Carpenters Union or in any other labor organization by discharging or in any other manner discriminating against any individual, and from in any other manner interfering with employees' statutory rights (R. 32). Affirmatively, the Company is required to offer Davis immediate and full reinstatement; to make him whole for any loss of earnings; and to post the appropriate notices (R. 32-33).

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD SUPPORTS THE BOARD'S FINDING THAT THE COMPANY INTERFERED WITH, RESTRAINED AND COERCED ITS EMPLOYEES IN THE EXERCISE OF THEIR STATUTORY RIGHTS, IN VIOLATION OF SECTION 8(a)(1) OF THE ACT

The record reveals that upon learning of the Union's claim to represent the employees, the Company initiated a campaign of interrogation, threats of reprisal, promises and granting of benefits, and suggestions of surveillance, all designed to intimidate the employees and influence them to renounce their support of and adherence to the Union. Thus, almost immediately after receiving the Union's letter of May 28 requesting recognition, Schroeder, the Company's general manager, declared that if he "found out who was starting [the Union], they would be out" (Tr. 89). A few days later, sawmill foreman Connor questioned employee Lynch as to his knowledge of the Union and whether other employees were active, and added that he (Connor) was concerned "because I would probably lose my job" (Tr. 99). In mid-June, Mill Superintendent Eichar remarked to employee Davis that it was "rumored" some of the men were signing union cards, and when Davis responded by avowing support for the Union, Eichar told him that belonging to the Union could interfere with his promotions, suggesting that advancements would not be as frequent "if you vote the wrong way" (Tr. 16). Eichar again approached Davis after the latter's conversation with

Schroeder on the twin topics of employment conditions and the Union, and after asking Davis if he had made up his mind how he was going to vote, advised Davis not to vote for the Union (*supra*, p. 5). During this same period, Schroeder queried employee Roberts as to the sources of employee dissatisfaction, at the same time holding out the promise of new benefits to be provided by the Company (*supra*, p. 3).

That the foregoing conduct constituted unlawful interference, restraint and coercion within the meaning of Section 8(a)(1) of the Act is clear.¹⁰ Before the Board, the Company's disagreement with the facts as found raised only questions of credibility, which are matters for the Trial Examiner and the Board, absent extraordinary circumstances not present here. See *N.L.R.B. v. Luisi Truck Lines*, *supra*, 384 F.2d at 846; *R.J. Lison Co., Inc. v. N.L.R.B.*, 379 F.2d 814, 817-818 (C.A. 9); *N.L.R.B. v. Thrifty Supply Co.*, 364 F.2d 508, 509 (C.A. 9); *N.L.R.B. v. Radcliffe*, 211 F.2d 309, 315 (C.A. 9), cert. denied, 348 U.S. 833.¹¹

¹⁰ Interrogating employees about their union sympathies: *N.L.R.B. v. Luisi Truck Lines*, 384 F.2d 842, 845 (C.A. 9); *N.L.R.B. v. Security Plating Co.*, 356 F.2d 725, 728 (C.A. 9). Threatening reprisals for union activities: *N.L.R.B. v. Ambrose Distributing Co.*, 358 F.2d 319, 320-321 (C.A. 9), cert. denied, 385 U.S. 838; *N.L.R.B. v. Kit Mfg. Co.*, 292 F.2d 686, 690 (C.A. 9); *N.L.R.B. v. Sebastopol Apple Growers Union*, 269 F.2d 705, 708 (C.A. 9).

¹¹ The Company did make a separate argument with respect to Connor's questioning of employee Lynch, which it contended was merely an expression of opinion and constituted an isolated incident. However, this conduct occurred in conjunction with the Company's efforts to dissipate the Union's support by other interrogation, threats of reprisal, and promises of benefit. In this context of expressed hostility toward the Union, the Board could reasonably find that the Company's efforts to discover the extent of union support tended to coerce, restrain and interfere with the employees' exercise of their statutory rights. See *N.L.R.B. v. Camco, Inc.*, 340 F.2d 803, 805-807 (C.A. 5), cert. denied, 382 U.S. 926. And on this record, the incident was hardly isolated.

The fact that the supervisors were instructed not to engage in coercive conduct cannot absolve the Company of responsibility. Statements and actions of company supervisors are attributable to the Company despite managerial instructions to refrain from such action. *N.L.R.B. v. Neuhoﬀ Bros. Packers, Inc.*, 375 F.2d 372, 376 (C.A. 5); *Hendrix Mfg. Co., Inc. v. N.L.R.B.*, 321 F.2d 100, 104 (C.A. 5). Declarations made by supervisory employees will be attributed to an employer under the Act when “employees would have just cause to believe that [the supervisors were] acting for and on behalf of the company.” *Irving Air Chute Co. v. N.L.R.B.*, 350 F.2d 176, 179 (C.A. 2), and cases cited therein. “It is what [they] said or did, not what [they were] told to say, do, or not say or do, that counts.” *Hendrix Mfg. Co., Inc. v. N.L.R.B.*, *supra*. Here, the employees can hardly have thought that their supervisors were acting contrary to company policy, for, whatever instruction the supervisors may have been given, there is no evidence that the employees knew of these and in fact, the Company’s top management participated directly in unlawful conduct.

Thus, the record shows that in addition to the above threats and interrogations, General Manager Schroeder created the impression that the employees’ union activities were under surveillance. During his conversation with Davis in June, Schroeder said that he knew that about 13 of the men had been attending union meetings and that he had the license number of their cars. The Board properly concluded that such statements, which lead employees to believe that their employer is keeping their union activities under surveillance, coerce or restrain the employees in violation of Section 8(a) (1) of the Act. See, *N.L.R.B. v. Security Plating Co., Inc.*, 356 F.2d 725, 728 (C.A. 9); *Hendrix Mfg. Co., Inc. v. N.L.R.B.*, *supra*, 321 F.2d at 104 n. 7; *N.L.R.B. v. Prince Macaroni Mfg. Co.*, 329 F.2d 803, 805-806 (C.A. 1); *N.L.R.B. v. S & H Grossinger’s, Inc.*, 372 F.2d 26, 28 (C.A. 2); *Int’l. Union of Electrical, etc. Workers v. N.L.R.B.*, 352 F.2d 361, 362 (C.A.D.C.), cert. denied, 382 U.S. 902, enforcing 147 NLRB 809, 820 (statement that Company knew who signed cards);

N.L.R.B. v. Gotham Shoe Mfg. Co., 359 F.2d 684, 685 (C.A. 2), enforcing 149 NLRB 862, 869-870 (statement that Company knew how many employees attended a union meeting).

In addition, the Company attempted to undercut the Union's campaign by promises and grants of economic benefits. After asking Roberts in mid-June why the men were "unsatisfied so that they would have to consider other actions," Schroeder mentioned the health and welfare program and then promised that a new insurance plan, equal to any then in effect in the locality and to any offered by any union, would soon be explained to the men along with a retirement program (see *supra*, p. 3). During the week of June 21, Schroeder informed 11 employees that he would grant them vacation credits on a pro rata basis even though they lacked the requisite hours. Such promises of benefits during an election campaign, seeking to demonstrate to the employees that they could have their wants satisfied without a union, are clearly a violation of Section 8(a)(1) of the Act. *N.L.R.B. v. Security Plating Co.*, *supra*, 356 F.2d at 728 (C.A. 9); *N.L.R.B. v. Kit Mfg. Co.*, *supra*, 292 F.2d at 690 (C.A. 9). Though the Company's vacation policy is not precisely described in the record, it appears, as the Trial Examiner found, that the employees in the mill believed that they earned no vacation credits unless their period of employment extended from June 1 of one year through the following May 31, and that in that 12 months they worked at least 1400 hours. Schroeder as a witness claimed that he decided to grant these pro rata vacation credits because a similar arrangement had sometime earlier been reached at another of the Company's operations (Tr. 179-181, 192). However, as the Examiner pointed out in rejecting Schroeder's explanation, the timing of the granting of the vacations and the fact that the matter had not been raised by the employees warranted the inference that the Company "was motivated by a desire to dilute interest in the Union" (R. 16). The conferring of economic benefit in order to inhibit employee support for

a union violates Section 8(a)(1) of the Act. *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405; *J.C. Penney Co., Inc. v. N.L.R.B.*, 384 F.2d 479, 485 (C.A. 10); *American Sanitary Products Co. v. N.L.R.B.*, 382 F.2d 53, 57-58 (C.A. 10); *Betts Baking Co. v. N.L.R.B.*, 380 F.2d 199, 203 (C.A. 10); *N.L.R.B. v. Yokell*, 387 F.2d 751, 755-756 (C.A. 2).

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING EMPLOYEE DAVIS BECAUSE OF HIS UNION ACTIVITY

Some six weeks after learning of employee union activity, the Company discharged Jerry Davis, an active union adherent and previously a valued employee. Although the Company contended that the discharge was for valid cause, the Board found that Davis was discharged because of his unionism.¹² This Court has recognized that the determinative question in cases such as this is one of fact — i.e., what was the “actual motive” for the discharge. *Shattuck Denn Mining Corp. v. N.L.R.B.*, 362 F.2d 466, 470 (C.A. 9). In determining this question, the Board is entitled to rely on circumstantial as well as direct evidence, and its inference of motivation must stand where it is reasonable and supported by substantial evidence on the record considered as a whole.

¹² That the Board disagreed with the Trial Examiner's ultimate conclusion as to Davis does not detract from the substantiality of the support for the Board's result. The Examiner's resolution of conflicting testimony was not disturbed. The disagreement related solely to the inferences to be drawn from the whole record and the proper application of the statute. In such a case, “the presumptively broader gauge and experience of members of the Board have a meaningful role.” *Oil, Chemical & Atomic Workers Int'l Union, Local 4-243 v. N.L.R.B.*, 362 F.2d 943, 946 (C.A.D.C.). Accord: *F.C.C. v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364; *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 496; *Cheney California Lumber Co. v. N.L.R.B.*, 319 F.2d 375, 377 (C.A. 9). Cf. *N.L.R.B. v. Tom Johnson, Inc.*, 378 F.2d 342, 343-344 (C.A. 9).

Universal Camera Corp. v. N.L.R.B., *supra*, 340 U.S. at 488.¹³ As has been repeatedly recognized, a reviewing court may not “displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.” *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404, 405. Accord: *Aeronca Mfg. Co. v. N.L.R.B.*, 385 F.2d 724, 727 (C.A. 9); *Shattuck Denn Mining Corp.*, *supra*, 362 F.2d at 469-470. We show below that under these settled principles the Board’s decision here is supported by the record and entitled to enforcement.

Davis began his employment with the Company as a laborer in October 1964 and, as shown *supra*, pp. 5-6, he made rapid advancement along the promotional ladder. Both Superintendent Eichar and Foreman Connor admitted at the hearing that Davis generally did a good job (Tr. 238, 379). When Davis remarked to Schroeder, during their June conversation, that some of the men resented the fact that he (Davis) had been promoted so rapidly, Schroeder said that Davis had been promoted because he was the most eligible (Tr. 19).

It is clear from the record that Davis was a leading union adherent among the Company’s employees (see *supra*, p. 3). It is likewise evident that immediately after hiring as a foreman John Womack, who had personal knowledge of Davis’ union adherence, the Company, through Eichar and Schroeder, proceeded to subject Davis to a series of unlawful interrogations, threats and promises of benefits designed to discourage his union adherence. See *supra*, pp. 4 - 5. When Davis was discharged on July 16, Connor said nothing about failings as a worker but only that Davis was “a big problem” (R. 18; Tr. 250-251). Even though pushed for a more definite explanation, Connor told Davis simply that “I can’t commit myself, you talk too much on the job.” (R. 18; Tr. 22).

¹³ Accord: *Shattuck Denn Mining Corp.*, *supra*, 362 F.2d at 470; *N.L.R.B. v. Mrak Coal Co.*, 322 F.2d 311, 313, 314 (C.A. 9); *Bon Hennings Logging Co. v. N.L.R.B.*, 308 F.2d 548, 553-554 (C.A. 9).

This evidence, the Board properly concluded, established *prima facie* that Davis' discharge was attributable to his unionism. Hence it became incumbent upon the Company, if it would avoid that result, to come forward with a valid explanation for the discharge. The "real reason lay exclusively within its knowledge." *Montgomery Ward & Co. v. N.L.R.B.*, 107 F.2d 555, 569 (C.A. 7), citing *N.L.R.B. v. Remington Rand Inc.*, 94 F.2d 826, 872 (C.A. 2), cert denied, 304 U.S. 576.

However, the explanation offered by Company witnesses was, the Examiner found, incredible. Thus, Connor, who effected the discharge, attributed it to alleged wanton destruction of lumber (R. 18; Tr. 246). Connor testified that he saw Davis deliberately destroy about 1000 feet of lumber on July 16, and Hartwig claimed that a day or two before that he saw Davis ruin five times that much lumber and so reported to Connor (Tr. 211, 249-250). The Trial Examiner discredited this testimony, noting that although the claimed misconduct was both grave and continuing and would have cost the Company many hundreds of dollars, neither Connor nor Hartwig acted immediately upon making their alleged observations, and that remarkably enough Connor did not even mention it when Davis was discharged (R. 18-19).¹⁴ To be sure, the record shows that Davis had a hasty temper, had a tendency to blow the millwright's whistle for help to a greater degree than the Company thought necessary, and had experienced some difficulties with the lugs on the trim saw (refusing in one instance to fix them himself because of the danger involved and his previous

¹⁴ Employee Cook testified that it would have taken ½ hour for Davis to have slashed through 5000 feet of lumber, and in that time everyone would have noted either a backlog or absence of lumber (Tr. 394-395). Moreover, Hartwig's purported observations of malfeasance by Davis were, by Hartwig's own account, made from a catwalk 30 feet above the mill floor and from a point on that catwalk which was 80 feet laterally across the mill floor (Tr. 221-223, Appendix B, *infra*, pp. B1-B2). From this distance and angle, according to Hartwig, he could see a split in a board no wider than a pencil line, and thus could judge the grade of lumber going through Davis' machine (Tr. 226-227).

instructions from Eichar) (R. 17, 18, 19; Tr. 379, 213-214, 280-281, 52). However, the Company did not assign any of these as reason for Davis' discharge. As this Court has often stated, "the existence of some justifiable ground for discharge is no defense if it was not the moving cause." *N.L.R.B. v. Security Plating Co.*, *supra*, 356 F.2d at 728, and cases cited therein. Accord: *Aeronca Mfg. Co. v. N.L.R.B.*, 385 F.2d 724, 727 (C.A. 9); *N.L.R.B. v. Isis Plumbing & Heating Co.*, 322 F.2d 913, 922 (C.A. 9).¹⁵

In sum, the Company's action stands without any credible explanation. Indeed, the Board's inference that Davis' termination was motivated by his union adherence gains strong support from the failure of the reason advanced by the Company to withstand scrutiny. See, *N.L.R.B. v. Dant & Russell, Ltd.*, 207 F.2d 165, 167 (C.A. 9); *N.L.R.B. v. Sebastopol Apple Growers Union*, *supra*, 269 F.2d at 710; *N.L.R.B. v. Griggs Equipment Co., Inc.*, 307 F.2d 275, 278 (C.A. 5).

"Thus," as the Board found, "the discharge of Davis is left unexplained unless it is found rooted in discriminatory considerations, the only apparent explanation that is fairly

¹⁵ There is no substance to the Company's contention that the Trial Examiner erred in excluding testimony regarding Davis' employment elsewhere before he was hired by the Company and subsequent to his discharge on July 16. As to Davis' prior employment, company counsel questioned a company foreman who had been Davis' supervisor at a previous place of employment, asking the foreman "what if anything" he could say "about the quality of Mr. Davis' work" based on that prior experience (Tr. 343). When the foreman admitted that he had had nothing to do with Davis' discharge by the Company and, further, that he had not told the Company's management "what kind of a fellow Davis was or what kind of a worker he was" (*ibid.*), the Trial Examiner sustained objection to the above-quoted question. As the materiality of the information sought is not apparent, and the Company made no proffer of what it intended to adduce, the Examiner's ruling was plainly correct (Tr. 343-344). Similarly without apparent materiality was the testimony sought to be adduced from Davis as to where he went to work after being fired by the Company (Tr. 57-58). Again the Company made no offer of proof, simply asserting that "whether or not [Davis] was able to hold onto a job" was "relevant to whether or not the Company had a justifiable basis for discharging him" (*ibid.*). On this inadequate showing, the Examiner was surely acting within his allowable discretion in limiting exploration of remote events. Cf., *N.L.R.B. v. Champa Linen Service*, 324 F.2d 28, 30 (C.A. 10). Moreover, even if the excluded testimony was intended to show Davis as hotheaded during other employment, the Examiner accepted testimony by Foreman Connor and Millwright Hartwig that Davis had a hasty temper and was sometimes careless during his tenure at the Company (R. 17, 19). Hence the Company can hardly have been prejudiced by the evidentiary rulings here.

inferable from the evidence adverted to above” (R. 30). As this Court stated in *Shattuck Denn Mining Corp. v. N.L.R.B.*, *supra*, 362 F.2d at 470:

Nor is the trier of fact . . . required to be any more naïf than is the judge. If he finds the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal — an unlawful motive — at least where . . . the surrounding facts tend to reinforce that inference

In the instant case, the Board could properly draw that inference, and reasonably conclude that “Davis’ discharge was motivated by his pro-union sentiments and his resistance to the threats and blandishments designed to bring him over to [the Company’s] side” (R. 29).¹⁶

¹⁶ The Board was not required to deny Davis the normal remedy of reinstatement with back pay simply because, in a telephone conversation after his discriminatory discharge, Davis threatened to “beat up” Superintendent Eichar for giving him a poor recommendation (Tr. 61-62). Intemperate employee reaction to unlawful discrimination does not bar the usual remedies. As the Court of Appeals for the Fourth Circuit has stated of similar circumstances (*N.L.R.B. v. M. & B. Headwear Co.*, 349 F.2d 170, 174):

An employer cannot provoke an employee to the point where she commits such an indiscretion as is shown here and then rely on this to terminate her employment The more extreme an employer’s wrongful provocation the greater would be the employee’s justified sense of indignation and the more likely its excessive expression [R]efusal to reinstate her would put a premium on the employer’s misconduct.

Accord, *N.L.R.B. v. Morrison Cafeteria Co.*, 311 F.2d 534, 538 (C.A. 8) (employee cursed and offered to fight supervisor); *J.P. Stevens & Co., Inc.*, 157 NLRB 869, 878 n. 8, enforced as modified in respects not here material, 380 F.2d 292 (C.A. 2) (employee slapped supervisor). See also, *Oneita Knitting Mills, Inc. v. N.L.R.B.*, 375 F.2d 385, 389-391 (C.A. 4), and cases cited therein.

III. THE BOARD'S ORDER IS PROPER

The Board's order, adopting in this respect the recommended order of the Trial Examiner, directs the Company to cease and desist from the unfair labor practices found and from interfering "in any other manner" with employees' statutory rights. Before the Board, the Company excepted with particularity to the separate findings of the Trial Examiner, but did not specifically except or refer to any portion of the Trial Examiner's recommended order (see R. 26-27). Accordingly, Section 10(e) of the Act and the Board's implementing rules preclude consideration of that issue here.

Section 10(e) provides that "No objection that has not been urged before the Board shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." And see NLRB Rules and Regulations, Series 8, as amended, Sections 102.46(a)(b) and (h), and 102.48(a), 29 C.F.R. Sections 102.46(a)(b)(h) and 102.48(a). The purpose of requiring the filing of exceptions to the Trial Examiner's decision is to insure that the Board is given an opportunity to exercise its statutory decision-making function on all relevant issues prior to judicial review. See, *N.L.R.B. v. Cheney California Lumber Co.*, 327 U.S. 385, 389; *U.S. v. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37. The Supreme Court has uniformly held that, at least when the Board has not "patently travelled outside the orbit of its authority" (*N.L.R.B. v. Cheney California Lumber Co.*, 327 U.S. 385, 388), absent "extraordinary circumstances" the failure or neglect of the respondent to urge an objection in the Board's proceedings forecloses judicial consideration of the objection in enforcement proceedings. *May Department Stores, Inc. v. N.L.R.B.*, 326 U.S. 376. Accordingly, as the Company failed to except to the breadth of the Examiner's recommended order, the propriety of the Board's adoption of that broad order may not be litigated before the reviewing court. *N.L.R.B. v. Local 476, United Ass'n of Journeymen etc.*, 368 U.S. 401; *N.L.R.B. v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322.

Furthermore, the Company cannot reasonably complain about the Board's expansion of the Examiner's recommended order to include specific prohibitions against discouraging its employees' membership in the Union or any other labor organization by discharging or in any other manner discriminating against them. If, as the Board found, Davis' discharge was violative of Section 8(a) (3) and (1) of the Act, such remedial provisions designed to prevent like or related conduct are plainly appropriate and within the Board "discretionary authority to fashion remedies to purge unfair labor practices." *N.L.R.B. v. District 50, United Mine Workers*, 355 U.S. 453, 458. For "[i]t is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts." *N.L.R.B. v. Express Publishing Co.*, 312 U.S. 426, 436. This "salutary principle" warrants the specific restraints which the Board here imposed. See *Marshfield Steel Co. v. N.L.R.B.*, 324 F.2d 333, 339 (C.A. 8); *N.L.R.B. v. Standard Metal Fabricating Co.*, 297 F.2d 365, 367 (C.A. 8).

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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 DOMINICK L. MANOLI,
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 MARCEL MALLET-PREVOST,
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 JANET KOHN,
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Attorneys,
National Labor Relations Board.

April, 1968

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * * *

[Sec. 10]

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief of restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

The following portions of the original transcript in Board Case No. 20-CA-3728 were inadvertently omitted from the reproduced transcript.

C. Hartwig for Respondent, Cross,

[221]

Q. [By Mr. Kintz] There is a file shop?

A. Filing room.

Q. Where you file saws?

A. Right.

Q. Is that on the first catwalk?

A. No, it is on the second catwalk, clear on the top of the mill.

Q. How far up is that?

A. Oh, it must be 30 feet.

Q. From the floor of the mill?

A. From the floor of the mill.

Q. It was up there that you were standing on the day – the 16th of July – the last day Jerry was working?

A. Right.

Q. Is that where you were watching?

A. Yes, right.

Q. And were you right over the top of the trimmer?

A. No, I wasn't right over the top of the trimmer because every time you would get over that place, why, he could see you.

[222]

Q. So you were back a ways?

A. I got back a ways from him.

Q. Turning around and looking at that diagram behind you, show us about where you were.

A. Well, that shows the floor of the mill. That doesn't show any of the catwalks.

Q. I assume from what you said, Mr. Hartwig, that this is a two-dimension drawing. We understand that you have to have a third dimension to show the catwalk. I notice here in the top center of the drawing is the trimmer. From what you said, you weren't immediately above that. I assume you were above one of the other parts.

A. I was about right here above the trimmer. You see the catwalk is on a way up above.

Q. You were actually over the edgerman?

A. The edgerman is just outside the filing room door. I was at the filing room door.

Q. You were about 30 feet in the air above the floor of the mill where the edgerman is situated, is that right?

A. Right.

Q. How far — How wide is the mill from the hula saw to the edger resaw?

A. 70 feet.

Q. The mill is also about 70 feet wide, is that right?

A. Right.

[223]

Q. And I see the edger is not directly on the far wall of the mill from the trimmer but is a little further down toward one end; is that right?

A. Right.

Q. I assume then from the appearance of that diagram that the edger should be about 80 feet across the floor from the trimmer or more; is that right?

A. Oh, about.

Q. About 80 feet or more across the floor from the trimmer to the edger and then you were 30 feet up in the air; is that right?

A. (Witness nodding affirmatively.)

APPENDIX C

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| <u>No.</u> | <u>Identified</u> | <u>Offered</u> | <u>Received in Evidence</u> |
|------------|-------------------|-----------------|-----------------------------|
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| 2 | 10 | | |
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| 4 | 67 | 67 | 67 |
| 5 | 70 | . | |
| 6 | 106 | rejected p. 106 | |
| 7 | 319 | | |

RESPONDENT'S EXHIBITS

| <u>No.</u> | <u>Identified</u> | <u>Offered</u> | <u>Received in Evidence</u> |
|------------|-------------------|----------------|-----------------------------|
| 1 | 164 | 386 | 387 |
| 2 | 141 | 141 | 141 |
| 3 | 163 | 162 | 163 |
| 4 | 180 | 180 | 180 |
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No. 22573

United States
COURT OF APPEALS
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MILLER REDWOOD COMPANY,
Respondent.

*On Petition for Enforcement for an Order of the
National Labor Relations Board*

BRIEF FOR THE MILLER REDWOOD COMPANY

FILED

MAY 27 1968

JWM: B LUCK, CLERK

SCHWENN, BRADLEY & BATCHELOR
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No. 22573

United States
COURT OF APPEALS
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.

MILLER REDWOOD COMPANY,
Respondent.

*On Petition for Enforcement for an Order of the
National Labor Relations Board*

BRIEF FOR THE MILLER REDWOOD COMPANY

RESPONDENT'S BRIEF

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), for enforcement of its order issued against respondent on May 5, 1967. The Board's de-

cision and order (R. 28-34, 13-23)¹ are reported at 164 NLRB No. 52. This Court has jurisdiction of the proceeding, the alleged unfair labor practices having occurred in Crescent City, California, where respondent operates a lumber mill.

STATEMENT OF THE CASE

Respondent asserts that the statement of the case offered by petitioner is incomplete and inaccurate in some aspects. However, in the interests of brevity, respondent does not make a supplemental statement of the case but rather relies on the facts as developed and substantiated in its argument.

ARGUMENT

- 1. The record as a whole does not offer substantial evidence that respondent interfered with, restrained or coerced its employees in violation of Section 8 (a)(1) of the Act.**

Mr. Fred McDonald, a witness for the general counsel, testified he heard Mr. Schroeder say that if he found out who started the union² they would be out. McDonald could not remember who was present, but recalled that the conversation took place on a

¹ References Designated "R." are to Volume I of the record as reproduced, pursuant to Rule 10 of this Court. "Tr." refers to the portions of the stenographic transcript of the unfair labor practice hearing, reproduced pursuant to Court Rules 10 and 17.

² The United Brotherhood of Carpenters and Joiners of America, A.F.L.-C.I.O.

morning (Tr. 92) in May (Tr. 89, 90). The first notice Mr. Schroeder had of union activity was a letter from the union dated May 27, 1965³ which he received on May 28, and opened that afternoon (R. 14; Tr. 172). He then called the Timber Operator's Council in Portland, Oregon and was advised not to make any comments about union activities (R. 14; Tr. 173-174). The mill did not operate on May 29, 30 or 31 (Tr. 172-173). There was therefore no morning in May when the statement could possibly have been made. These facts taken together conclusively demonstrated that Mr. Schroeder did not make the alleged statement.

Employee Lynch testified Mr. Connor questioned him about union activities and expressed the fear that he would lose his job if the union came in. In his supervisory capacity the fact that the union had not worked out for him previously, the asserted reason for the statement (Tr. 99), would not cause Mr. Connor concern in his present job. This discredits the allegation of such statements.

Mr. Davis testified that in the middle of June he went to Mr. Eichar's office to report an injury and that Eichar's first comment was that he had heard a rumor of unionization. According to Davis, he then quite conveniently pointed out to both Eichar and Connor, who was also there, that he was in favor of the union (R. 15; Tr. 14). Davis' testimony of the conversation continued as if taken from a text on

³ All dates herein refer to the year 1965 unless otherwise designated.

how to commit an unfair labor practice. All of these statements were supposedly made two days after a meeting of respondent's supervisors where they were specifically advised about comments to employees.

The General Counsel attempts to make the extension of vacation benefits, which had previously been in force in respondent's other plants, to the one here in question appear as an unfair labor practice. Mr. Davis' testimony was that when called in to have the vacation explained the session started with talk about the union. All of the other eleven employees getting this benefit indicated that there was no such discussion (Tr. 342). These benefits were given, not promised, and there is nothing, not even the incredulous testimony of Mr. Davis, that would indicate the vacations were promised in return for promises to refrain from supporting the union (R. 14; Tr. 18).

The Supreme Court has stated that:

"Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. It means such relevant evidence as a *reasonable mind* might accept as adequate to support a conclusion." *N.L.R.B. v. Columbian Co.*, 306 U.S. 292, 300. (emphasis added).

The General Counsel seeks to support all but one of the 8(a)(1) allegations by the uncorroborated testimony of Mr. Davis, a highly interested witness, who stands to profit from a substantial back pay award. Not only is Mr. Davis' testimony uncorroborated but it is strangely contradicted in every significant facet

by the testimony of supervisors and fellow employees alike.

Even if the implausible testimony of Mr. Lynch were to be credited, this would constitute but an isolated incidence of interrogation, completely devoid of any interference, threat or coercion.

II. The record does not support the Board's finding, in contradiction of that of the trial examiner, that respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Davis because of his union activity.

A. The record as a whole does not offer substantial evidence that respondent discharged Davis because of his Union activity.

On this point of discriminatory discharge the decision of the Board differed from that of the Trial Examiner. In such a situation the Court has a special duty to examine the evidence. *N.L.R.B. v. Tru-Line Metal Products Co.*, 234 F.2d 614, 615 (C.A. 6); *Burke Golf Equipment Co. v. N.L.R.B.*, 284 F.2d 943, 944 (C.A. 6).

When Davis was first hired he was recognized as having the potential to become a valuable employee if he could overcome attitude and temperament problems. His attitude finally deteriorated in the last few weeks of his employment to the point he was discharged (Tr. 249, 380).⁴ Illustrative of this attitude

⁴ It is admitted that Davis was given fast promotion up to the time just prior to his discharge. But, this is not inconsistent with the Company's always having apprehension about his performance. Rather, it shows that Davis was typical of

was Davis' threatening to beat up a guard on July 16 (Tr. 241, 373), walking off the job when he was supposed to be working during the vacation period (Tr. 244, 375), disregarding or walking away from his supervisors when they addressed him (Tr. 249), and throwing temper tantrums and temporarily leaving his machine (Tr. 373). During the period he operated the trimmer, Mr. Davis caused a continual problem from lugs being thrown out of alignment (R. 17, 19; Tr. 207, 245, 282, 283, 289, 298). Four witnesses stated that during Davis' last month of employment the blowing of the millwright whistle for the trimmer increased (Tr. 207, 241, 245, 278). Mr. Hartwig, a millwright, testified that whistles for the trimmer became so frequent the last week Mr. Davis worked that he became suspicious as to how the lugs were being knocked out so often (R. 19; Tr. 206). He also testified there was a great amount of good lumber going into the chipper from Davis' trimmer. Mr. Reynolds, another millwright, verifies this (Tr. 27).

Because of these problems, Mr. Hartwig watched Davis from a catwalk and observed him deliberately kick the lugs out of line. When Davis did this it necessitated shutting the trimmer down and caused a back up of lumber there. In order to catch up Davis would either slash, mistrim or not trim at all, swamping the hula saw (Tr. 271, 114). Hartwig reported

the talented but temperamental: He always had a good potential but at the same time created problems. The Company tried to indulge Davis for a time, hoping that he would develop into the top employee he was capable of becoming. Finally, the problems were too great, and Davis was discharged.

this to Mr. Connor, suggesting Mr. Davis be told to fix his own lugs (Tr. 210, 245). On July 16, Mr. Connor told him to do so (Tr. 244). Mr. Davis admitted this (Tr. 55). Nevertheless, three employees testified the problem continued (Tr. 213). The trial examiner specifically found that Hartwig and Connor believed that Davis was intentionally kicking the lugs out of line and slashing lumber (R. 19).

Mr. Connor testified that because of Mr. Hartwig's report he observed Mr. Davis at work the next day, July 16, and saw Davis slashing and mistrimming (Tr. 245, 255). Mr. Connor then independently decided that Mr. Davis must be discharged (Tr. 246, 250, 251, 252).

After Davis' discharge, there was less remill and mistrim (Tr. 364, 288, 333). Also, the problem of lugs being knocked out of line virtually disappeared (Tr. 288, 278, 304, 382, 272).

B. The N.L.R.B. improperly used a legal presumption to find that the General Counsel had established a prima facie case of discriminatory discharge.

The N.L.R.B.'s Decision and Order finding Davis' discharge to have been discriminatory is based upon a presumption which is applicable in some extreme situations, but not under the facts of the present case. An analysis of the present facts and the authorities cited in the Board opinion and by the General Counsel demonstrates this.

In *Montgomery Ward & Co. v. N.L.R.B.*, 107

F.2d 555 (C.A. 7) the employer discharged 23 employees from three departments, 96% of whom were union members. In addition, the manager delivered four speeches vituperatively attacking the union and threatening to close the plant if the union struck.

In *N.L.R.B. v. Dant & Russell, Ltd.*, 207 F.2d 165 (C.A. 9) one of the dischargees was on the union standing committee, and he held this position when the union struck for one month. There were numerous statements made by management officials expressing their desire to rid themselves of the two employees who were subsequently discharged. The two employees had not been criticized about their work during the three days prior to the discharge.

Similarly in *Virginia Metal Crafters, Inc.*, 158 N.L.R.B. No. 90 the discharged employee had worked for the respondent for some eight and one half years. Upon the advent of the union, he was discharged without warning. The employee was told several times that the reason for his discharge was his bad attitude toward the company. The manner in which the employee's bad attitude was brought home to him left little doubt he was being discharged for his support of the union.

An employee who had an unblemished work record for nine years was discharged in *Shattuck Denn Mining Corp. v. N.L.R.B.*, 362 F.2d 466 (C.A. 9). He was active in support of a new union; serving in its organization and then as vice president, steward and member of the grievance committee, and was dis-

charged immediately after bringing a grievance. The alleged ground of discharge was insubordination to a supervisor. However, the supervisor did not even testify at the trial.

A female employee who had been a strong union organizer was discharged on the union election day, purportedly for playfully defacing a single apple on the canner's production line in *N.L.R.B. v. Sebastopol Apple Growers Union*, 269 F.2d 705 (C.A. 9). Such horseplay was common, and no one else had ever been discharged because of it.

In *N.L.R.B. v. Griggs Equipment Co.*, 307 F.2d 275 (C.A. 5) an employee of ten years who was an active union organizer was discharged at the height of union activity. No reason was given at the time. The company later said it was because of his breaking into a candy machine eight months earlier, and his inability to perform his work because of a physical handicap with which he had been afflicted all during his employment.

None of the factors which gave rise to a prima facie case in the decisions relied upon the Board and cited by the General Counsel are found in the present matter. In fact, the Trial Examiner found absolutely no pattern of discrimination, (R. 19, lines 14-16).

The decisions relied upon by the General Counsel required a finding of an 8(a) (3) violation only where a prima facie case is presented establishing an anti-union motivation for the discharges, and the employer offers no evidence from which a conflicting in-

ference can be drawn. In the instant matter, the Examiner, viewing the record as a whole, found that no such prima facie case had been established by the General Counsel, (R. 19, Lines 7-16, 20, Lines 1-6). Further, he found that respondent presented credible evidence from which conflicting inferences could be drawn (R. 19, Lines 55-60). Even though the Examiner discredited testimony that management personnel watched Davis "slash" 5,000 feet of lumber on one occasion and 1,000 feet on another he did not discredit all of the testimony of sabotage (R. 18, Lines 56-60, 19, Lines 42-52 and 56-59). The Examiner also found that the discharging supervisor was convinced Davis was deliberately throwing lugs out of line, not fixing them himself, contrary to instructions, and slashing good lumber (R. 19, Lines 55-60).

Not only did Davis cause an inordinate amount of trouble with the lugs being knocked out of line (R. 17, 95; Tr. 207, 241, 245, 278, 282, 283, 289, 298) and timber being lost from mistrimming, but he also threatened to beat up a guard shortly before his discharge (Tr. 241, 373), walked off the job when he was supposed to be working during the vacation period (Tr. 244, 375), disregarded or walked away from his supervisors when they addressed him (Tr. 249), and threw temper tantrums and temporarily left his machine on occasion (Tr. 373). Davis' union activities were known to the company for many weeks before his discharge. In fact, it appears that at the time of the discharge his interest in the union had decreased (R. 19, 20). This does not match the classic

prima facie case by presumption. The Trial Examiner recognized the importance of these factors when he stated he lacked conviction that respondent discharged Davis because of union activity and that he was unsure whether or not respondent even believed Davis had more than a passive interest in the Union at the time of the discharge (R. 19, 20). Even if the discharge had closely followed the start of Davis' union interest, or had been made while it continued, the prima facie case would not have been established. If such a situation had been coupled with a good work record on the part of Davis, there would have been a stronger argument for raising a presumption. But here we have nothing of this.

As the Court stated in *Montgomery Ward v. N.L.R.B.*, supra, at page 560:

“ . . . or does the evidence advanced by the employer merely give rise to another and inconsistent inference? If the most that can be said after all the evidence is in and each side has rested is that the evidence picture permits conflicting inferences, it is not enough.”

The Court in *Lozano Enterprises v. N.L.R.B.*, 347 F.2d 500, 503 (C.A. 9) set forth the premises upon which the evidence in the instant matter is to be viewed:

“ . . . With discharge of employees a normal, lawful legitimate exercise of the prerogative of free management in a free society, the fact of discharge creates no presumption, nor does it furnish the inferences that an illegal—not a proper

—motive was its cause. *An unlawful purpose is not lightly to be inferred.*" (Emphasis added)

Viewing the record as a whole in the present case, precedent prohibits the finding of an 8(a)(3) violation. Respondent has presented sufficient credible evidence to raise conflicting inferences as to the motivation for Davis' discharge.

III. Assuming that Davis' discharge was discriminatory, the N.L.R.B.'s order of reinstatement is improper in light of the violence and threatened violence by Davis immediately prior and subsequent to his discharge.

Prior to his discharge, Davis had engaged in physical and oral altercations on several instances, by his own admissions (Tr. 40-44). And subsequent to his discharge Davis, knowing Superintendent Eichar had not given him a good recommendation, called Eichar and inquired what kind of a recommendation had been given. Davis became angry at his response and threatened to "beat him up," stating it would be worth \$50.52 (presumably the fine for such an offense) to do so. And, when questioned about the incident at trial, Davis reiterated the same resentment against Eichar which he had expressed at the time of the threat (Tr. 61-62).

It has been clearly established that the Act will not require reinstatement of an employee who, subsequent to his discharge, threatens a supervisor with physical violence. *N.L.R.B. v. Bin-Dicator Co.*, 356 F.2d 210 (C.A. 6); *N.L.R.B. v. Trumbull Asphalt Co.*

of *Del.*, 327 F.2d 841, 846 (C.A. 8); *N.L.R.B. v. National Furniture Mfg. Co.*, 315 F.2d 280 (C.A. 7); *N.L.R.B. v. Valley Die Cast Corp.*, 303 F.2d 64, 66 (C.A. 6); *N.L.R.B. v. Kelco Corp.*, 178 F.2d 578 (C.A. 4). This is particularly true in a situation such as the present one where the employee has demonstrated a propensity to engage in physical combat, his hostility toward the particular supervisor persists, and he possesses the prodigious size, six feet four inches and 245 pounds (Tr. 29), necessary to carry out his threat.

This is unlike *N.L.R.B. v. M. & B. Headwear Co.*, 349 F.2d 170 (C.A. 4) where there was vile language and slapping by a girl. Davis is a huge man with a short temper who by his own admissions engaged in threats and fights during the course of his employment. And, the premeditation of Davis' threat, taken together with a lack of repentance for the misconduct and an unchanged attitude toward Eichar, indicate Davis would be likely to actually use violence if reinstated.

This is not a situation where an employer aggravated an employee into violence and then used this violence as a reason for discharge. (See Appellant's Brief page 16, note 16). Threats in such a situation do not bar reinstatement because to do so would defeat the policies of the Act. But, by the same reasoning, an improperly discharged employee will only be reinstated when that remedy serves to effectuate the policies of the Act. *Iowa Beef Packers, Inc. v. N.L.R.B.*, 331 F.2d 176 (C.A. 8). In the present situation

reinstatement would defeat those policies by giving the benefits of the Act to one who intentionally ignored its provisions for peaceful settlement of disputes.

Davis knew that Eichar's recommendation had not been good. His inquiring of Eichar as to the nature of his recommendation in such a situation can only be concluded as antagonistic. It also eliminates the possibility that the threat which flowed from the conversation was a spontaneous reaction to injustice, or "a moment of animal exuberance" which would be justified and allow reinstatement. *Milk Wagon Drivers Union of Chicago Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293, 61 S. Ct. 552, 85 L. Ed. 836. It could have been nothing more than a premeditated attempt to take things into his own hands. With such an attitude continuing, it is difficult to imagine that there could be a satisfactory employer-employee relationship maintained. Even in the absence of violence where there is a conflict of this magnitude between employer and employee reinstatement will not be ordered. *N.L.R.B. v. National Furniture Mfg. Co.*, 315 F.2d 280 (C.A. 7).

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue denying the Board's order.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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